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No.

IN THE

Supreme Court of the United States

CHRISTINE WELLS GROFF AND MICHAEL WELLS,
PETITIONERS

v.

UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the families of professional firefighters killed in the line of duty and recognized by the public safety agency as designated members of the public safety agency and functioning as part of the public safety agency should be denied the federal death benefit provided under the Public Safety Officers' Benefits Act of 1976, 42 U.S.C. §§ 3796(a) ("PSOBA") based on a blanket per se exclusion created by the Department of Justice Bureau of Justice Assistance ("BJA") (that they are not entitled to the benefit because they are working through a contract with a third party) which is contrary to Congress's legislative intent, BJA's regulations and BJA's own interpretation of the statute?

2. Whether the blanket exclusion created by the BJA to the right to the federal death benefit should be given deference under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843-44, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) ("*Chevron*") as a statutory interpretation announced through a benefit determination, even though it is contrary to Congress's legislative intent, BJA's regulations and the BJA's own interpretation of the statute? If this is allowed to stand it provides precedent for all governmental agencies to pursue their own agendas rather than the dictate of statute and Congress.

3. Whether the United States Court of Appeals for the Federal Circuit can change the expression of Congress's legislative intent, which is that Congress wanted to ensure that professional firefighters were covered by the PSOBA, by mis-quoting its prior decision?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit, dated July 3, 2007, revised July 11, 2007, is reported at 493 F.3d 1343 and reprinted in the Appendix to the Petition ("App.") at App. p. 1a to 23a. The opinion of the United States Federal Court of Claims, dated July 27, 2006, is reported at 72 Fed. Cl. 68 and reprinted at App. p. 24a to 78a. The final Agency decision in this matter is dated July 20, 2005 and reprinted at App. p. 90a to 118a. The denial of the claim by Hearing Officer Robert J. Gemignani is dated February 20, 2004 and reprinted at App. p. 79a to 86a. The initial denial of the claim by the BJA, Public Safety Officers' Benefits Claim Determination, is dated October 31, 2002 and reprinted at App. p. 87a to 89a.

JURISDICTION

The Court of Appeals entered its judgment on July 3, 2007. Pursuant to Supreme Court Rule 13.1, this Petition has been filed within ninety (90) days of the entry of the judgment.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

The Public Safety Officers' Benefits Act of 1976, Pub. L. No. 94-430, 90 Stat. 1346, codified as amended at 42 U.S.C. §§ 3796 *et seq.*, specifically 42 U.S.C. § 3796(a) which provides:

> In any case in which the Bureau of Justice Assistance (hereinafter in this subchapter referred to as the "Bureau") determines, under regulations issued pursuant to this subchapter, that a public safety officer has died as the direct and proximate result of a personal injury sustained in the line of duty, the Bureau shall pay a benefit of $250,000.

STATEMENT

A. Factual Background

Petitioners are the family of a professional firefighter killed in the line of duty while fighting a fire as pilot of aerial firefighting aircraft ("airtanker") owned, operated and controlled by the California Department of Forestry and Fire Protection ("CDF".) The BJA denied the Petitioners' claim for the federal death benefit under PSOBA because the BJA has created out of whole cloth an exclusion that excludes firefighters serving a public agency through a contract with a third party from receiving PSOA benefits ("per se exclusion".) There is no basis for this exclusion.

1. Mr. Groff Died While Fighting A Fire In An Aircraft Owned, Operated, and Controlled By The CDF And Functioning As Part of CDF

On August 27, 2001, Lawrence Groff, the husband of Petitioner Ms. Groff and the stepfather of Petitioner Michael Wells, was killed when the California Department of Forestry and Fire Protection ("CDF") airtanker he was piloting collided in mid-air

with another CDF airtanker, piloted by Lars Stratte. At the time of his death, Mr. Groff was delivering fire retardant as part of a CDF fire fighting operation. Both airtankers were owned by the CDF and operated under the control and direction of the CDF for public use fire suppression and were being operated solely for the purposes of state business.

Both pilots were involved in fighting a wildfire burning outside of Hopland, California. This "Bus Fire," as it was known, was started by two individuals who were operating a meth lab in the area. These individuals were later prosecuted and found guilty of murdering firefighters Groff and Stratte.

For primarily budgetary reasons, CDF operates its firefighting airtanker fleet through an annual contract with a third party entity for maintenance and pilots. As the CDF attested in this case, the function of the third party entity is as a pay conduit. Except for the means in which they are paid, the pilots are otherwise part of the CDF. The airtankers and their pilots are an integral part of CDF's firefighting capabilities and operations, especially in the ever-increasing wildland-urban interface.

The record is replete with evidence that Mr. Groff was fully integrated into the firefighting services of the CDF and was functioning as part of the CDF while performing these services. In the interests of brevity, included here are factual findings from the Federal Claims court decision.

Based on a review of the record, the Federal Claims court found that Mr. Groff was fully integrated into the firefighting services of the CDF as a firefighter. The full record below amplifies that the relationship between CDF and Mr. Groff was pervasive.

a. Mr. Groff Was Serving a Public Agency in an Official Capacity As a Firefighter When He Died

During firefighting operations, contract pilots such as Mr. Groff were supervised by a CDF air tactical group supervisor who would "ordinarily fly in an orbit above the level of the airtankers and . . . describe targets to the airtanker and helicopter pilots." The CDF dispatched the planes flown by pilots such as Mr. Groff and specified what uniforms those pilots would wear. Contractor pilots were required to participate in CDF debriefings (critiques of missions) and were evaluated by CDF personnel. Contractor pilots had CDF credit cards for refueling CDF planes. Mr. Groff, from the evidence provided in the CDF aviation handbook, was functioning as a part of the CDF as he was performing firefighting services, much like a CDF employee.

Whatever the contracting entity, the pilots continued to work for CDF year after year. These were highly experienced pilots, with years of firefighting experience. They were interagency carded, which meant that the pilots were authorized as to operate a State airtanker and to participate in mutual aid responses to federal agency fires. They had the authority as a State firefighter pilot under the Federal Aviation Regulations to close airspace to civil aircraft, to get priority handling from the FAA on airspace use, and to give orders as necessary to suppress wildland fires.

On the day of his death, Mr. Groff was performing services under the supervision of a CDF air tactical group supervisor, a battalion chief, flying above his airtanker.

Letters from the CDF submitted with Petitioners' claim explain Mr. Groff's role within the CDF. The Federal Claims court reprinted one of these letters in almost its entirety because it was "highly relevant." W. David Wardall, the CDF Deputy Chief of Aircraft Maintenance and Engineering, wrote to the BJA:

> "Mr. Eric Martin [of the BJA] called me last [sic] and advised that your Department has received the line of - duty death claim package for one of our pilots, Captain Larry Groff. Eric asked if Captain Groff was an employee of CDF or San Joaquin Helicopters. The Coroners Death Certificate listed San Joaquin Helicopters as the employer. This is a true statement. The employer, San Joaquin Helicopters was merely a conduit to provide pay to our pilot. However, Captain Groff, was in our opinion, serving as an officially recognized and designated member of the California Department of Forestry and Fire Protection.
>
> The State of California has submitted the PSOB death benefit application for Captain Groff because Larry Groff was the Pilot-in-Command of a State Airtanker responding to a State wildland fire. The following facts support our claim that Captain Groff was in fact "officially recognized and a designated member of the California Department of Forestry and Fire Protection and a State firefighter":
>
> 1. Larry Groff was an interagency "carded" Airtanker Pilot. This designation

authorized and required Larry Groff to operate a State fire fighting airtanker as Pilot-in-Command. Larry had the authority, duty and obligation to respond to wildland fires and to take immediate and independent action to suppress and combat wildfires.

2. The State of California and the US Government were the beneficiaries from the fire fighting flight operations.

3. Larry Groff operated a State airtanker for the State of California on State fires and mutual aid responses to Federal Agency fires.

4. Larry Groff operated a State owned airtanker at the direction of CDF dispatchers and airborne air attack officers in command and control aircraft.

5. Larry Groff slept at State airtanker bases with other State firefighters, ate State furnished meals and wore a State supplied flight suit and helmet.

6. Larry was the final authority and responsible for the safe operation of the State Airtanker.

7. Larry had the authority as a State firefighter pilot under the Federal Aviation Regulations to close airspace to civil aircraft, to get priority handling from the FAA on airspace use, and to give orders as necessary to suppress wildland fires.

. . . .

> The State of California is submitting the above information for the wife and children of Airtanker Pilot Lawrence L. Groff, SSN [].
>
> I certify under the penalty of perjury that Larry Groff was performing the duties of Pilot-in-Command on a State airtanker, was duly recognized and designated as firefighter pilot by the State of California, Department of Forestry and Fire Protection and was killed in the line-of-duty.
>
> The State of California hereby requests that the Department of Justice to provide an affirmative determination that Captain Groff's wife and children are entitled to the Federal Firefighter death benefit. Thank you for your consideration and assistance! If you have any questions, please call me.

Mr. Wardall's second letter is also relevant and adds further detail and was published by the Federal Claims court in part:

> The only function of the contractor [SJH] was to provide a means to pay long term (contract) employees. Typically, our pilots and maintenance technicians have 20 to 30 years of service and are retained from contract to contract because of the extensive knowledge and experience.

> We also set pilot standards, must approve the hiring of each pilot, train the pilots, check ride and finally card the pilots for State duty. The pilots were and continue to operate aircraft with the full authority of a State firefighter pilot. The sole function of the contractor was/is to provide a means of paying the pilots and maintenance technicians.

These letters written by Mr. Wardall show that Mr. Groff was fully integrated into the CDF and was performing services as a part of the CDF much like a CDF employee.

The BJA was required to give substantial weight to all of Mr. Wardall's factual statements concerning Mr. Groff's duties, working conditions, supervision, and "authority as a State firefighter pilot." See *Demutiis v. United States*, 291 F.3d 1373, 1379 (Fed.Cir. 2002).

2. Mr. Groff Was "A Designated Member Of California Department Of Forestry And Fire Protection And A State Firefighter"

There is ample evidence of official recognition by the CDF of Mr. Groff's services, in support of the contention that he was "officially recognized or designated as functionally within or a part of the public agency." Some of this recognition demonstrates that Mr. Groff was functionally part of the CDF. For example, Mr. Wardall refers to Mr. Groff as "one of our pilots." Mr. Wardall also refers to Mr. Groff as a "State firefighter pilot." The CDF quoted above also directly addressed the issue of official recognition and Mr. Groff's role within the CDF. This demonstrates that he was a designated and recognized as a member of the

CDF, as the CDF stated, and provided the facts that support our claim that Captain Groff was in fact "officially recognized and a designated member of the California Department of Forestry and Fire Protection and a State firefighter."

The Federal Claims court found that Mr. Groff was officially recognized and designated as being functionally within or a part of the CDF, and that his service meets the "official recognition" test established by the BJA. While Mr. Groff was nominally employed through a company call d San Joaquin Helicopters ("SJH"), the CDF specifically stated that this was a matter of administrative convenience and that SJH was "merely a conduit to provide pay to our pilot."

Two days after Mr. Groff's death, the CDF issued a news release regarding the Bus Fire, in which it stated that it was continuing to investigate the mid-air collision "that killed **CDF pilots** Mr. Groff and Lars Stratte." (emphasis added). Mr. Groff was buried on September 4, 2001, with full fire service honors.

The State of California prosecuted the two individuals who started the fire under California Penal Code § 452.1(a), which provides for enhanced penalties where someone has committed a felony in which a "firefighter, peace officer or other emergency personnel suffered great bodily injury as a result of the offense." The prosecution specifically alleged that, "Lawrence Groff was killed while employed as a firefighter."

The National Transportation Safety Board ("NTSB") found that the CDF was operating the CDF airtanker for "public-use fire suppression flights".

B. Proceedings Below

On August 21, 2002, Petitioners applied for PSOBA benefits. As part of this submission, the CDF submitted the BJA form *Report of Public Safety Officer Death.* On October 31, 2002, the BJA denied Petitioners' claim and found that due to the contract between SJH and CDF, Mr. Groff was privately employed at the time of his death, and Petitioners were ineligible for PSOBA benefits (the per se exemption.) Petitioners subsequently appealed to a BJA hearing officer.

On February 24, 2004, the BJA hearing officer sustained the denial of PSOBA benefits, again based on the conclusion that as a private employee, Mr. Groff was not a public safety officer, thus, Petitioners were not entitled to PSOBA benefits (the per se exemption.)

On February 9, 2005, Petitioners appealed the hearing officer's decision to the Director of the BJA. On July 5, 2005, the BJA Director affirmed the hearing officer's decision, again based on the finding that Petitioners were not entitled to PSOBA benefits because Mr. Groff was privately employed at the time of his death (the per se exemption.)

On September 29, 2005, Petitioners filed suit in the Federal Claims court to challenge the final agency determination by the BJA denying PSOBA benefits.

On July 27, 2006, the Federal Claims court held that the BJA's decision was erroneous and granted the claimants' motion for judgment on the administrative record, awarding them the $250,000 PSOBA benefit. The Federal Claims court found that the BJA failed to correctly apply its tests for "serving a public agency in an official capacity" in conformance with 42 U.S.C. § 3796b(9)(A), failed to give substantial weight to the fact

findings of the CDF as required by 28 C.F.R. § 32.5, incorrectly drew an adverse inference regarding the sufficiency of "official recognition" evidence provided by the CDF in contravention of 28 C.F.R. § 32.21(b), and that the BJA did not substantially comply with PSOBA and PSOBA's implementing regulations when denying Petitioners PSOBA benefits.

The BJA appealed to the United States Court of Appeal for the Federal Circuit. On July 3, 2007, revised July 11, 2007, the Federal Circuit Court of Appeal issued its opinion, reversing the Federal Claims' court decision on the grounds that the BJA decision was entitled to deference under *Chevron*. On appeal the *Groff* claim was consolidated with the appeal by plaintiff in the matter *LaBare v. United* States, 72 Fed. Cl. 111 (2006), which upheld the denial of the PSOBA benefit, but the court recognized in La*Bare*, the *Groff* case was distinguishable from the *La Bare* case due to the "pervasive relationship" between CDF and Mr. Groff.

REASONS FOR GRANTING THE PETITION

A. THE PER SE EXCLUSION OF FIREFIGHTERS SUCH AS MR. GROFF UNDERMINES THE VERY PURPOSE OF PSOBA.

The Petitioners are before this Court because their husband/stepfather was a firefighter killed fighting a fire while piloting an airtanker owned by CDF which was part of a CDF fire suppression operation. However, the BJA denied the Petitioners the one time federal death benefit provided by the PSOBA. This denial results from an erroneous position of the BJA that the decedents of a firefighter serving a

public agency through a contract with a third party cannot be eligible for the death benefit, the per se exclusion referred to herein. This position is contrary to the scheme of the PSOBA, Congress's intent and BJA's regulations and published policy.

Permitting this BJA per se exclusion to persist will have the opposite effect of the statutory purposes articulated by Congress for the death benefit under the PSOBA of increasing morale of fire departments, assisting in recruiting efforts, showing appreciation for public service personnel, and alleviating economic and emotional burdens on the families of the deceased public safety officers, including professional firefighters.

Air tanker pilots are an integral part of firefighting tactics in the wildlands of the Western states. These areas are increasingly susceptible to large fires, as the wildland-urban interface grows exponentially (this is where most development is built), climate conditions such as global warming are producing long fire seasons, and , according to the Federal Bureau of Investigation, there is a real threat of domestic terrorism through large scale arson. This is not the time to damage morale and hinder recruiting for airtanker pilots.

The PSOBA is a recognition of the extraordinary risks public safety officers face. In the course of adopting the statute, Congress specifically expressed these purposes, as the court reminded the BJA in *Davis v. United States*, 50 Fed.Cl. 192, 207 (2001):

> "The motivation for this legislation is obvious: The physical risks to public safety officers are great; the financial and fringe benefits are not usually generous; and the

> officers are generally young with growing families and heavy financial commitments. The economic and emotional burden placed on the survivors of a deceased public safety officer is often very heavy.
>
> The dedicated public safety officer is concerned about the security of his family, and to provide the assurance of a Federal death benefit to his survivors is a very minor recognition of the value our government places on the work of this dedicated group of public servants.

S. Rep. No. 94-816, at 3-4, reprinted in *1976 U.S.C.C.A.N.* at 2505. See also *Demutiis*, 48 Fed. Cl. at 85-86." *Davis v. United States*, 50 Fed. Cl. 192, 208 (Ct. Cl. 2001)

BJA's per se exclusion, which is at best caviling, denies the benefit that Congress has ordained because of how the public agency, in this case the CDF, structures the staffing of its planes and performance of its firefighting operations for budgetary reasons. In so doing, the BJA undermines the morale and recruiting for an integral part of these agencies such as CDF's firefighting capabilities. So much for the peace of mind and governmental assurance envisioned by Congress.

In reversing the Federal Claims court, the Federal Circuit Court of Appeals erroneously accorded *Chevron* deference to the BJA's decision. In so doing, the Federal Circuit Court of Appeals misapplied *Chevron*, and accorded *Chevron* deference to an agency determination that was divorced and divergent from the BJA's own interpretation of the statute, its regulation and Congressional intent. If this is allowed to stand it provides precedent for all governmental

agencies to pursue their own agendas rather than the dictate of statute and Congress.

The Federal Circuit Court of Appeals also distorted the clear Congressional intent it had highlighted in its decision of a few months earlier, *Amber-Messick v. United States*, 483 F.3d 1316 (Fed. Cir. 2007). In *Amber-Messick*, the Federal Circuit Court of Appeals determined that Congress wanted to **ensure** that "professional firefighters" were included within the coverage of PSOBA citing H.R. Rep. No. 94-1031, at 4 (1976) ("The bill defines 'firemen' to include volunteer as well as professional firemen."). *Amber-Messick*, 483 F.3d at 1324. Respectfully, to exclude coverage, the same court in this case, in order to permit exclusion of the Petitioners' claim, mis-quoted its ruling; the Federal Circuit Court of Appeals changed the statement of Congressional intent: "As we observed in *Amber-Messick*, the drafters of the PSOBA were concerned with ensuring that both volunteer and public employee firefighters were included with the scope of the Act." (App. p. 18a) However, this change to "public employee" from "professional firefighter" is unsupported by the Congressional record, which as originally quoted in *Amber-Messick* was to ensure that "professional firefighters", not just 'public employee firefighters" were included within the scope of the PSOBA

Clearly, under the legislative intent directly quoted in *Amber-Messick* (to ensure that "professional firefighters" were included within the scope of PSOBA), the BJA's per se exclusion is impermissible, and that since Mr. Groff was a professional firefighter serving a public agency in an official capacity, the Petitioners are entitled to the PSOBA federal death benefit.

1. The Scheme of the PSOBA

In 1976, Congress enacted the PSOBA to provide death, disability and dependent educational benefits to qualified claimants of public safety officers who have been injured or killed in the line of duty. 42 U.S.C. § 3796. The PSOBA provides:

> In any case in which the Bureau of Justice Assistance (hereinafter in this subchapter referred to as the "Bureau") determines, under regulations issued pursuant to this subchapter, that a public safety officer has died as the direct and proximate result of a personal injury sustained in the line of duty, the Bureau shall pay a benefit of $250,000.[42 U.S.C. § 3796(a)]

A public safety officer is defined by PSOBA, in relevant part, to be "an individual serving a public agency in an official capacity, with or without compensation, as a law enforcement officer, as a firefighter, as a chaplain, or as a member of a rescue squad or ambulance crew . . ." 42 U.S.C. § 3796b(9)(A) (formerly codified at 42 U.S.C. § 3796b(8)(A)). The regulations promulgated by the BJA mirror the statute. See 28 C.F.R. § 32.2(j) (2002) ("Public safety officer means any individual serving a public agency in an official capacity, with or without compensation, as a law enforcement officer, firefighter, rescue squad member or ambulance crew member."). The operative definition of "firefighter" "includes an individual serving as an officially recognized or designated member of a legally organized volunteer fire department". 42 USCS § 3796b(4). The PSOBA authorizes the BJA to formulate such rules, regulations and procedures as

may be necessary to carryout the purposes of [the statute] and that these will be determinative of any conflicts of laws questions. 42 U.S.C. §3796c.

The determinations under the PSOBA are fact specific. *Winuk v. United States*, 77 Fed. Cl. 207, 223 (2007). (As the BJA itself admits "no PSOBA cases are alike" PSOB Checklist, www.ojp.usdoj.gov/BJA/grant/psob/PSOBchecklist.pdf.)

Fact findings by the public agency whose public safety officer has died are entitled to substantial weight as the BJA reviews a PSOBA claim. 28 C.F.R. § 32.5 (2001). *Demutiis v. United States*, 291 F.3d 1373, 1379 (Fed. Cir. 2002). Although responsibility for making a final determination rests with the BJA, the legislative history of PSOBA shows that it should be interpreted with an "expansive and generous impulse, not a cramped and miserly one" (App. p. 48a), and all reasonable doubt of fact should be resolved in favor pf Petitioners. *Davis v. United States* (2001), 50 Fed.Cl.192, 210. Judicial Review of the BJA's decisions is available to the Court of Federal Claims. *Winuk*, 77 Fed. Cl. at 213

Within this framework, properly applied, Mr. Groff was a public safety officer, as defined by PSOBA, at the time of his death.

2. The Origins of the BJA Per Se Exclusion

BJA's per se exclusion, that a so-called "contract pilot" is not entitled to PSOBA benefits, is not a creation of statute or regulation.[1] It is created solely in

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[1] As is clear from the factual distinctions between the *LaBare* and *Groff* cases, the per se exclusion ignores the factual distinctions

a BJA claim determination decision, a decision in which the BJA specifically does not follow its own stated definition, its own regulation or statute. That the Federal Circuit Court of Appeal gave *Chevron* deference to the per se exclusion is primarily based upon a fundamental misunderstanding of the genesis of the per se exclusion, the failure to apply the statutory scheme as a whole as well as the specific facts of the case. Respectfully, as noted above, it also required the Federal Circuit Court of Appeal to materially misquote its own prior decision. *Amber-Messick* at 1324.

The Federal Circuit Court of Appeals upheld the BJA's per se exclusion that a so-called "contract pilot" cannot be treated as "serving a public agency in an official capacity." A principal reason underlying the Federal Circuit Court of Appeal's error is its miscomprehension of the pamphlet, *Legal Interpretations of the Public Safety Officers' Benefits Act*, published by the Office of General Counsel, Office of Justice Assistance, Research and Statistics, United States Department of Justice, published in 1981 ("*Legal Interpretations*".) The Federal Circuit Court of Appeal was in error when it opined that the *Legal Interpretations* "codified" its contents. (App. p. 15a) The "*Legal Interpretations*" was in fact a compilation including the PSOBA, the Regulations, and various opinion letters, hearing officer decisions and administrator's decisions. As the Introduction to the *Legal Interpretations* states:

> This volume is intended to inform the reader of LEAA's [the predecessor

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between gradations of contract pilots, such as who owns the planes, supplies the uniforms, etc. See Footnote 1.

> administrative agency to BJA] decisions on the principal legal issues that have arisen over the first five years of the Act's existence. (App. p. 119a)

The *Legal Interpretations* did not publish the legal opinions and decisions included in their original expression, rather the "documents were edited for format, syntax, and clarity . . ." (App. p. 120a)

The root of this misunderstanding is likely the rarity of the "*Legal Interpretations*". The Department of Justice, under whose umbrella BJA operates, does not have a copy in its library. There are only six (6) copies available in libraries in the world. Indeed, the copy of the *Holstine* decision used by the BJA as part of the record is not even a copy from the "*Legal Interpretations*" publication. For instance, the sub-heading "1. Contract Pilots" has been added and is not present in the official version. The BJA has failed to explain this addition. The added sub-heading gives a false impression of structure. There is no subpart "1", nor "2". The next entry in *Legal Interpretations* is "E. Dogcatcher." This more eclectic structure of the compilation underscores its true purpose as disclosed in the Introduction, to inform the reader of various claim determinations and other agency utterances, not as a formal codification of precedential authorities. As such, it is not entitled to *Chevron* deference under *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655; 146 L. Ed. 2d 621 (U.S. 2000) ("Interpretations such as those in opinion letters -- like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law -- do not warrant Chevron-style deference.")

The BJA per se exclusion that a so-called

contract pilot cannot be eligible for PSOBA benefits originates in a decision, otherwise unpublished, that is included in the *Legal Interpretations* compilation: Administrator's Final Decision, July 8, 1980 ("*Holstine*"). The per se exclusion was a product of the erroneous and selective application of the definition of "serving in an official capacity" that was included in that decision. As with the language of the statute, "serving . . . in an official capacity", the agency definition included in *Holstine* broader is than "employee", focusing on function and a relationship "similar" to an officer, employee, or volunteer.

In *Holstine*, the BJA denied a PSOBA benefits claim relating to a privately employed pilot who was killed while performing state aerial firefighting duties.[2] The BJA relied upon two factors: (1) the contract between CDF and the third party contractor, which included the *pro forma* provision that the contractor, its agent and employees "shall act in an independent capacity and not as officers or agent of the State of California.", and (2) one colloquy in the House as "proof" of Congressional intent to exclude contractors from PSOBA coverage, to wit:

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[2] In an unpublished decision, the United States Ninth Circuit Court of Appeals affirmed the BJA's determination *Holstine v. U.S. Dept. of Justice*, 688 F.2d 846 (9th Cir. 1982) (Table). The Ninth Circuit's affirmance is of no precedential value whatsoever, and the BJA erred to the extent it relied upon the Ninth Circuit's opinion as precedent for denying Petitioners' claim. Under Ninth Circuit rules, the Court's unpublished opinions are not binding precedent and may not be cited except when relevant under the doctrine of law of the case, res judicata or collateral estoppel. *See* 9th Cir. R. 36-3 (citation of unpublished opinions and orders).

> Rep. Myers: "Could the gentleman tell me, is there any way in which this bill would apply to privately employed safety or security officers?"
> Rep. Eilberg: "No, it would not."
> Rep. Myers: "What if they were called by a local arm of the government or the local police organization to assist in any way?"
> Rep. Eilberg: "It is my opinion that they would not be included."

122 Cong. Rec. 12002, 12009 (1976).

As set forth below, this isolated excerpt does not support that professional firefighters such as Mr. Groff are not serving in an official capacity, especially in the context of the structure employed by public agencies such as the CDF. Pilots such as Mr. Groff <u>are</u> the airtanker wing of the CDF, they are not responding to a call for assistance by a local arm of government.

In *Holstine*, the BJA included a definition of the meaning of "serving . . . in an official capacity."

> In order to be serving a public agency in an official capacity one must be an officer, employee, volunteer, or similar relationship of performing services as a part of a public agency. To have such a relationship with a public agency, an individual must be officially recognized or designated as functionally within or a part of the public agency.

Later, the Federal Circuit Court of Appeals found "nothing unreasonable" about this definition of "serving in an official capacity" in *Chacon v. United States*, 48 F.3d 508, 512. *Chacon* cited to the *Legal Interpretations* alone, and did not mention the *Holstine*

decision or the per se exclusion at all. The Chacon court did not need to consider the "similar relationship" part of the definition in that case.

In *Holstine*, the agency definition was erroneously and arbitrarily applied resulting in the per se exclusion. While being an employee would certainly establish coverage, the agency definition allows for other "similar relationships" to qualify. The *Holstine* decision arbitrarily eliminated those designated as functionally within or part of a public service, such as Mr. Groff, from coverage because they were not employees. The second part of the agency definition was not properly applied in *Holstine*. Furthermore, *Holstine* is the product of a limited, unpublished record.

Chacon acknowledges that the official recognition and functional part of the test can apply in non-employee situations. 48 F.3d at 513, n.4. In *Chacon*, the Federal Circuit considered an appeal of a PSOBA benefits denial brought by the survivor of a prison inmate who was killed battling a forest fire while serving on a prison work gang. The *Chacon* Court noted that, in arguing that the prisoner qualified for PSOBA benefits, his survivor did not maintain "that the BJA's regulatory definition of 'serving in an official capacity' is unreasonable, and we see nothing unreasonable in it. Instead, he argues that it has been misapplied in this case." *Chacon*, 48 F.3d at 512. Specifically, the appellant did **not** argue that the inmate had a "similar relationship" to an "officer, employee, volunteer," by being "officially recognized or designated as functionally within or a part of the public agency." *Id.* at 513 n.4. The *Chacon* Court did not consider this part of the test.

3. The Federal Circuit Court of Appeals Opens Pandora's Box In Condoning the Per Se Exemption

The Federal Circuit Court of Appeal concluded that the BJA decision on Petitioner's claim based on the per se exclusion was entitled to *Chevron* deference. The Federal Circuit Court of Appeal stated:

> In this case we make explicit what was implicit in our prior decisions in *Chacon* and *Amber-Messick*: that Congress intended for the BJA's statutory interpretations announced through adjudication to have the force of law, and that those interpretations are therefore entitled to deference under Chevron. (App. p. 13a)

The Federal Circuit Court of Appeal then stated:

> We do not rest our decision to apply the Chevron doctrine in this case on the BJA's regulations or its interpretation of its regulations. (App. p. 21a)

The Federal Circuit has now given the BJA's per se exclusion a life of its own – but this is impermissible under the statutory scheme and the correct application of the rules of deference.

> *Chevron* deference requires that a court ask the following questions when reviewing an agency's construction of a statute: First, the court must ask "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, Inc., 467 U.S. at 842-43. If the congressional intent is clear,

> then the court looks no further, "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842-43 (footnote omitted). However, if Congress is silent, or if it has left the statute "ambiguous with respect to the specific issue," the court must ask the second question: "whether the agency's answer is based on a permissible construction of the statute." Id. at 843 (footnotes omitted).

Winuk v. United States, 77 Fed. Cl. 207, 218 (Ct. Cl. 2007)

4. The BJA Per Se Exclusion, Endorsed By the Court of Appeals, Is Not Entitled to *Chevron* Deference For Many Reasons

The Federal Circuit Court of Appeals opined that as had been implicit in its previous decisions of *Chacon* v. United States, 48 F.3d 508 (Fed. Cir. 1995) and *Amber-Messick* 483 F.3d 1316 (Fed. Cir. 2007) that BJA statutory interpretations announced through adjudication had the force of law, and they are therefore entitled to *Chevron* deference. In *Chacon*, the court upheld the use of the definition in *Holstine* that acknowledged that "serving . . in an official capacity" was not limited to an employment relationship, but also included "similar relationships." 48 F.3d at 512. In *Amber-Messick*, the court approved a "common meaning" definition of firefighter used by the BJA. 483 F.3d at 1324. In this case, the court gave *Chevron* deference to the per se exemption from the unpublished *Holstine* decision which unreasonably restricts the BJA definition adopted in *Chacon*. The

source of the exemption makes it unfit for *Chevron* deference, and it is also not entitled to *Chevron* deference because it is unreasonable.

The other reasons why *Chevron* deference is inappropriate include:

a. The statute at issue, 42 U.S.C. 3796(a), specifically instructs that the BJA make its determination of a claim "under regulations issued pursuant to this subchapter." The BJA's per se exclusion is not a regulation. The regulation on this issue mirrors the statute, and is not entitled to deference. *Auer v. Robbins*, 519 U.S. 452, 461-463, 117 S. Ct. 905, 137 L.Ed.2d 79 (1997). The Federal Circuit Court of Appeals also made plain in its footnote that the per se exclusion was not a regulation. (App. p. 21a-22a) The BJA's per se exclusion is therefore beyond the mandate issued by Congress.

b. The definition used by BJA, as including similar relationships as that of employee or volunteer, does not lead to the brightline result that so-called contract pilots are not eligible. Quite the opposite. Using the definition in *Holstine* and approved in *Chacon*, the Federal Claims court found that, in applying the facts to this case, Mr. Groff was fully integrated into the CDF and was performing services as a part of the CDF much like a CDF employee; that Mr. Groff was performing services as a part of the CDF, and that his service met the "similar relationship" standard for "serving a public agency in an official capacity." The Federal Claims court found that Mr. Groff was officially recognized and designated as being functionally within or a part of the CDF, and that his service met the "official recognition" standard established by the BJA. The BJA definition of the statute may be entitled to *Chevron* deference, but the

per se exclusion that is divergent from that definition, and many times removed from the statute, is not.

c. The meaning of the statute is purely a matter of statutory construction and legislative intent and therefore a matter for the courts, not the BJA, since the interpretation is not based upon any particular expertise of the BJA. e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, 94 L. Ed. 2d 434, 107 S. Ct. 1207 (1987).

d. The BJA cannot gain deference for its per se exclusion merely by making it the basis of a decision. This is the case, however "formal" the adjudicative process employed may be. (The Federal Circuit Court of Appeals pinned its analysis for *Chevron* deference on the relatively formal adjudicative process for a claim determination.) Even in a formal adjudicative process, an agency cannot abandon some aspects of its published regulations to pursue a policy outside the regulations. Moreover, Courts "must reject administrative constructions of the statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32, 102 S. Ct. 38, 70 L. Ed. 23 (1981). The courts cannot merely rubber stamp all administrative interpretations.

e. The BJA per se exclusion is not plausible or reasonable, but arbitrary and capricious, and conflicts with Congress' express intent. *Rust v. Sullivan*, 500 U.S. 173, 184, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991) (citing *Chevron*.) It impermissibly narrows Congress's intent, and is therefore arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct.

2856, 77 L. Ed. 2d 443 (1983). See also, *Davis v. United States*, 50 Fed. Cl. 192 (Ct. Cl. 2001) ("The BJA Director's narrow interpretation of "line of duty" thus goes against the overall purpose of the PSOBA, making the Director's decision appear unreasonable to the court.") While the statutory language "serving . . . in an official capacity" and the agency definition clearly extend beyond merely an employment relationship, the per se exclusion narrows it by excluding professional firefighters serving the public agency through a third party contract. As set forth herein, this narrows the purpose of the PSOBA intended by Congress. If Congress had wanted to restrict the death benefit to employees only, it would have been simple enough for it to have said so.

f. Both the BJA and the Federal Circuit Court of Appeals elevated form over substance. Both the BJA and the Federal Circuit Court of Appeal focused almost exclusively on the CDF contract with Mr. Groff's employer, which provided that pilots were not CDF employees. This entirely begs the question. a. The statute is broader than employment. b. The facts demonstrate a pervasive relationship between Mr. Groff and CDF, akin to that of direct employment.

g. An unpublished agency decision is not entitled to *Chevron* deference. The Federal Claims court afforded deference to the agency definition used in *Holstine* because of *Chacon*, but correctly observed that as an unpublished decision the Holstine *Holstine* case was entitled to the lower level of deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944). (App. p.39a).[3]

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[3] See also *Hillensbeck v. United States*, 69 Fed. Cl. 369, 382 (Ct. Cl. 2006) "The Department of Justice's *Legal Interpretation*,

5. Under the Normal Rules of Construction, the Federal Circuit Court Should be Reversed, And the Per Se Exclusion Struck Down

In reviewing an administrative decision, the reviewing court is generally limited to determining: "(1) whether there has been substantial compliance with statutory and implementing regulations; (2) whether there has been any arbitrary or capricious action on the part of the government officials involved; and (3) whether there was substantial evidence supporting the decision." [citation omitted] *Chacon*, at 511.

In applying this standard to the BJA denial of Petitioners' claim, the Federal Claims court found that the BJA failed to correctly apply its tests for "serving a public agency in an official capacity" in conformance with 42 U.S.C. § 3796b(9)(A), and failed to give substantial weight to the fact findings of the CDF as required by 28 C.F.R. § 32.5. The Federal Claims court found that the BJA did not substantially comply with PSOBA and PSOBA's implementing regulations when denying Petitioners PSOBA benefits. (App. p. 71a)

The Federal Claims court decision was based upon a fair reading of the statute, the BJA's working definition, the regulation and a thorough analysis of legislative intent, applied to the facts of this case.

6. The Language of the Statute Does *Not* Restrict the PSOBA to Employees Only

At the heart of this matter is the meaning of the statute, 42 U.S.C. § 3796(a). One court has already

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while of general interest, are not "rules, regulations, or procedures."

determined that there is no ambiguity in the phrase "public safety officer", and affirming that the statutory definition of "public safety officer" does not require the individual to be a "public employee." *Hillensbeck v. United States*, 69 Fed. Cl. 369, 382 (Ct. Cl. 2006) [citing *Chevron*, 467 U.S. at 843 (holding only if the statute is "silent or ambiguous" is any further inquiry required.), and *Shalala v. Whitecotton*, 514 U.S. 268, 277, 115 S. Ct. 1477, 131 L. Ed. 2d 374 (1995) (O'Connor, J., concurring) (in determining the clarity of the statute, the court "relies on common sense consideration of the words[.]").

Petitioners maintain that based upon a common sense reading of the words and the statute, Mr. Groff was serving the CDF as an official at the time of his death, and did not have to be an "employee."[4] The meaning of serving is "one who serves" which in turn includes "to work for; to supply services; to be assistance to; to act in a specific capacity; to function as" *Webster's II, New Riverside University Dictionary* , p. 1066, col. 2 (1984); "official" means "Of or relating to an office or post of authority; authorized by a proper authority." *Webster's I, New Riverside University Dictionary* , p. 816, col. 1 (1984); "capacity" means "the position in which a person functions or the person's legal qualification or authority. (See *American Heritage Dict.* (1981) p. 199, col. 1; *Webster's New Internat. Dict.* (3d ed. 1970) p. 330, col. 3.)" See *Serv. Employees Internat. Union v. City of Redwood City*, 32 Cal. App. 4th 53 (Cal. Ct. App. 1995).

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[4] Petitioners also maintain that the level of control over Mr. Groff by CDF gave rise to an employee-employer relationship under *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323, 112 S. Ct. 1344, 117 L. Ed. 2d 581 (1992) and the California case, *S.G. Borello & Sons, Inc. v. Dept. of Indus. Relations*, 48 Cal. 3d 341, 256 Cal. Rptr. 54, 769 P.2d 399 (Cal. 1989).

Fairly applied, Mr. Groff was serving in an official capacity. Mr. Groff was performing an official function, flying a public aircraft as part of the public firefighting force to put out a fire threatening state owned property, people's lives and private homes. He was flying a CDF plane in a CDF uniform at CDF direction fighting a fire as part of the CDF efforts. He had the authority as a State firefighter pilot under the Federal Aviation Regulations to close airspace to civil aircraft, to get priority handling from the FAA on airspace use, and to give orders as necessary to suppress wildland fires. Except for the way he got his paycheck, there was no difference between Mr. Groff and a direct CDF employee.

The analysis need go no further. While Congress did not specifically define what serving a public agency in an official capacity means or address the specific issue whether a so-called 'contract pilot' fell within the definition or not, it is clear that when the common sense meaning of the words employed by Congress is used that Mr. Groff was serving a public agency in an official capacity at the time of his death. The CDF and the State of California have endorsed this.

7. A Fair Reading of the Legislative History Dictates An Award to Petitioners

The Federal Claims court properly and thoroughly analyzed the PSOBA and its legislative history. Regarding the brief colloquy cited above in the House used by the BJA as proof of Congressional intent to exclude "contractors" from PSOBA coverage, the Federal Claims court observed that the comments of a single member of Congress were "extremely weak support for categorically excluding contractor

firefighters from PSOBA." (App. p. 45a) It concluded that "this [by Representative Eilberg] debate fragment is largely irrelevant to the issue of PSOBA coverage for contractor firefighters, and reflects poorly on the thoroughness of the BJA's analysis of PSOBA's legislative history." (App. p. 46a)

Moreover, the brief reference to private safety or security officers called to assist on an *ad hoc* basis is a far cry from the structure and organization of modern sophisticated firefighting organizations such as the CDF. The aircraft and their pilots are an integral part of CDF's firefighting capabilities and operations. The airtanker fleet is of critical importance in fighting fires in wildlands, and in the rapidly increasing interface between wildlands and developed areas, the so-called wildland-urban interface. 60% of new housing was built in the wildland-urban interface between1990-2000. (The wildland-urban interface "the area where structures and other human developments meet of intermingle with undeveloped wildland.") United States Department of Agriculture, Forest Service, *Accomplishing and Applying National Fire Plan Research and Development From 2001-2005*, Section 4.15, page 35, 15 (May 2007). Besides natural causes, there is also the additional concern long espoused by the F.B.I. that domestic terrorists use arson in the wildlands as a terrorist weapon. (Testimony of James F. Jarboe, Domestic Terrorism Section Chief, Counterterrorism Division, Federal Bureau of Investigation, before the House Resources Committee, Subcommittee on Forests and Forest Health hearing on "Eco-terrorism and Lawlessness in the National Forests", February 12, 2002.) Moreover, the bulk of expert opinion is that there is a strong correlation

between the increase in large scale wildland fires in the Western states and global warming.

There is no contextual relationship between the comments in the House[5] about private security guards providing an ad hoc response and the circumstances of this case. This is also not the time to discourage people from becoming or remaining as air tanker pilots, since air tankers are a vital part of wildland fire suppression.

The Federal Claims court examined other statements made in debate. The PSOBA's legislative history does not reveal any intent to categorically exclude contractor firefighters from the definition of public safety officer. After examining both the House and Senate versions of the firefighter death benefit bills, the Federal Claims court did not find any sentiment toward excluding contractors who serve as firefighters. (App. p. 47a)

The debate fragment used to justify the BJA's position over the years was extracted from the House debate on the law enforcement officer death benefit bill, not the firefighter bill. (App. p. 45a) It was the Senate version of firefighter coverage, however, that was adopted by both houses of Congress and enacted as part of the final PSOBA, and not the House version. *Id.* Since the House accepted the Senate's language defining the PSOBA's scope of coverage for firefighters, "the debate in the House clarifying statutory terms that were never enacted as law carries

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[5] The Federal Claims court concluded "these few cited lines, out of hundreds of pages of the legislative history on these two bills in the House and Senate largely expressing gratitude to firefighters and law enforcement officers who sacrifice their lives in the line of duty, do not accurately mark the intent of Congress in granting or denying PSOBA benefits for the survivors of contractor firefighters." (App. p. 45a)

little to no weight in determining the legislative intent of Congress." (App. p. 47a)(citing H.R.Rep. No. 94-1501, at 5 (1976))

Debate more relevant to the coverage of firefighters does not show any intent to exclude contract firefighters from coverage. In fact, the legislative history of PSOBA shows that it should be interpreted with an "expansive and generous impulse, not a cramped and miserly one." (App. p. 47a) The generous impulse and broadening application of the PSOBA authorized by Congress is relevant to this consideration, particularly where the BJA is duty-bound to err on the side of coverage:

> The Bureau shall resolve any reasonable doubt arising from the circumstances of the officer's death or permanent and total disability in favor of payment of the death or disability benefit.

28 C.F.R. § 32.4.[6]

The Federal Claims court noted that the scope of the PSOBA has repeatedly been broadened. The amendments show, as correctly pointed out by the Federal Claims court, that there is no congressional intent showing that contractors can never be public safety officers, the position taken by the BJA and appellants. (App. p. 48a – 51a)

In sum, the Federal Claims court correctly analyzed the legislative history in determining there is

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[6] As part of the revisions promulgated after this cases was initiated, the BJA removed this provision from the regulations without explanation. 71 Fed. Reg. 154, 46035, August 10, 2006 (two weeks after the Federal Claims court issued the decision in this case).

no legislative intent to narrowly define what it means to be "serving a public agency in an official capacity." Just the opposite, the thorough, thoughtful analysis by the Federal Claims court shows the legislative history indicates that Congress is desirous of compensating fire fighters killed in the line of duty. The Federal Claims court rejected BJA's "narrow and cramped reading of the PSOBA so as to categorically ban PSOBA coverage for contractor firefighters." (App. p. 51a) The PSOBA "should not be applied grudgingly, but rather should be construed liberally to avoid frustration of its beneficial Legislative purposes." *Bice v. United States* (2006), 72 Fed.Cl. 432.

This result is wholly within the scope of coverage envisioned by coverage in the discussion of the meaning of "firefighter" recognized in *Amber-Messick*, that it was designed to cover all professional firefighters. *Amber-Messick*, 483 F.3d at 1324.

B. THE *PER SE* EXCLUSION IS IMPERMISSIBLE

In the face of its stated definition, the BJA's practice of holding that an official capacity *per se* cannot exist when a contractor or privately-employed individual provides service for the public agency is erroneous and unreasonable. Someone serving a public agency in an official capacity who is not an employee but in a "similar relationship" and is functionally a part of the public agency is supposed to be covered according to the BJA's interpretation. *Chacon*, at 512 and 513, n.4. The BJA did not faithfully apply that standard and truly consider whether Mr. Groff was in a similar relationship and officially recognized or designated as functionally within or a part of the agency. The BJA's, and subsequently the Federal

Circuit Court of Appeal's inquiry begins and ends with the fact that he was employed through a contractor and they almost exclusively focused on the face of the contract with the State. (See, App.p. 20a)

The BJA and the Federal Circuit Court of Appeals ignore the facts showing the nature of Mr. Groff's work and the day-to-day control exerted by the CDF. Instead, they myopically focus on the employer-employee relationship between SJH and Mr. Groff and the contract language governing the relationship between CDF and SJH, Mr. Groff's nominal employer. In so doing, the Federal Circuit Court of Appeals and the BJA impermissibly elevated form over substance. *United States v. R.F. Ball Constr. Co.*, 355 U.S. 587, 593, 78 S. Ct. 442, 2 L. Ed. 2d 510 (1958) ("Substance, not form or labels, controls the nature and effect of legal instruments."), reh'g denied, 356 U.S. 934, 78 S. Ct. 770, 2 L. Ed. 2d 763 (1958). *Winuk v. United States* (Ct. Cl. 2007), 77 Fed. Cl. 207 (reversing the denial of the death benefit by BJA to the family of Glenn Winuk, "a public spirited partner at the law firm of Holland & Knight, LLP and, at the time, an associate member of the Jericho, New York, Fire Department" who died attempting to give aid at the World Trade Center on September 11, 2001.)

As the Federal Claims court correctly noted, however, the administrative record demonstrates Mr. Groff "is a clear example of a non-employee who nonetheless is similarly providing services as part of a public agency, much like a public employee." (App. p. 63a).

As the Federal Claims court pointed out, the BJA "apparently chose to disregard the CDF's official recognition that Mr. Groff was a functional part of the CDF." (App. p. 66a) The BJA's refusal to accept the

CDF's clear official recognition that Mr. Groff was functionally within the CDF has no support in the representations of the CDF and "is unwarranted." (App. p. 70a) Once again, despite the fact the BJA was required to give substantial weight to the CDF's findings under *Demutiis*, it failed to do so. Based on the above, the CDF clearly recognized Mr. Groff as functionally within the CDF at the time of his death, and, accordingly, the BJA's own "official recognition" test is satisfied. (App. p. 70a)

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should be granted.

Respectfully submitted,

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(any footnotes trail end of each document)

2006-5141, 2007-5006

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CHRISTINE WELLS GROFF and MICHAEL WELLS,

Plaintiffs-Appellees,

v.

UNITED STATES,

Defendant-Appellant.

LAURIE H. LABARE (on behalf of herself and all others similarly situated),

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

July 3, 2007, Decided

COUNSEL: Peter Gray, Rider Bennett, LLP, of Minneapolis, Minnesota, argued for plaintiff-appellee in appeal 2006-5141. On the brief were Eric J. Magnuson, and Steven M. Sitek.

Timothy P. Mcilmail, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-

appellant in appeal 2006-5141. With him on the brief were Peter D. Keisler, Assistant Attorney General, and Jeanne E. Davidson, Director. Of counsel were Rafael A. Madison, General Counsel, Victoria O'Brien, and Jason P. Cooley, Attorney Advisors, Office of General Counsel, Office of Justice Programs, United States Department of Justice, of Washington, DC.

Peter Gray, Rider Bennett, LLP, of Minneapolis, Minnesota, argued for plaintiff-appellant in appeal 2007-5006. On the brief was Joseph S. Lawder.

Timothy P. Mcilmail, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee in appeal 2007-5006. With him on the brief were Peter D. Keisler, Assistant Attorney General, and Jeanne E. Davidson, Director. Of counsel on the brief were Rafael A. Madan, General Counsel, Victoria O'Brien and Jason P. Cooley, Attorney Advisors, Office of General Counsel, Office of Justice Programs, United States Department of Justice, of Washington, DC.

JUDGES: Before MAYER, BRYSON, and PROST, Circuit Judges.

OPINION BY: BRYSON

OPINION

BRYSON, *Circuit Judge*.

The Public Safety Officers' Benefits Act ("PSOBA"), 42 U.S.C. § 3796 et seq., provides benefits to the relatives of public safety officers who are killed as the result of injuries sustained in the line of duty. The statute also

provides benefits to public safety officers who are permanently disabled, *id.* § 3796(b), and educational benefits to dependents of federal law enforcement officers who are killed or disabled in the line of duty, *id.* § 3796d.

Congress has assigned administration of the benefit program to the Bureau of Justice Assistance ("BJA"), an agency within the U.S. Department of Justice. Prospective beneficiaries submit claims to the BJA, and the BJA determines, under regulations issued pursuant to statute, whether the decedent was a public safety officer who died under circumstances that entitle the beneficiaries to an award under the statute. 42 U.S.C. § 3796(a). Judicial review of the BJA's decisions is available in the Court of Federal Claims. *Demutiis v. United States*, 291 F.3d 1373, 1376 (Fed. Cir. 2002).

This is a consolidated appeal from two decisions of the Court of Federal Claims, *Groff v. United States*, 72 Fed. Cl. 68 (2006), and *LaBare v. United States*, 72 Fed. Cl. 111 (2006). The two cases both involve challenges to BJA determinations denying death benefits to the relatives of pilots who were employed by private contractors and who died while rendering fire suppression assistance to public agencies. The BJA denied the claims for benefits. The BJA ruled that neither of the pilots was a "public safety officer" within the meaning of PSOBA, because both were employees of private companies and therefore were not "serving a public agency in an official capacity" at the time of their deaths. *See* 42 U.S.C. § 3796b(9)(A).

The Court of Federal Claims in the *Groff* case overturned the BJA's decision denying benefits, while the

court in the *LaBare* case upheld the BJA's decision denying benefits. We hold that the BJA's decision should have been sustained in both cases. We therefore reverse the judgment in *Groff* and affirm the judgment in *LaBare*.

I

A

Lawrence Groff was employed as a helicopter pilot by San Joaquin Helicopters, a private company based in California. San Joaquin Helicopters entered into a contract with the California Department of Forestry and Fire Protection to provide piloting services for fire suppression missions. The contract provided that the company's employees "shall act in an independent capacity and not as officers or employees or agents of the State of California," that the company would indemnify California and maintain liability insurance for activities performed pursuant to the contract, and that the company would pay and provide benefits for the pilots who performed services under the contract. The aviation procedures handbook of the California Department of Forestry and Fire Protection states that "[c]ontractors must understand that they are acting in an independent capacity in the performance of their service, and not as an officer, employee, or agent of the state."

While piloting a helicopter pursuant to the contract, Mr. Groff died as a result of a mid-air collision with another aircraft. Following his death, Mr. Groff's wife and stepson, Christine Wells Groff and Michael Wells, applied for PSOBA benefits. The BJA determined that, as the employee of a government contractor, Mr. Groff did

not satisfy the PSOBA definition of "public safety officer," and it denied the claim. The claimants then requested and obtained a hearing at two additional levels of administrative review within the BJA, but the claim was denied at both levels. The hearing examiner and the Director of the BJA both wrote lengthy opinions explaining the reasons for the denial. In essence, both concluded, based on a legal position the BJA had adhered to for more than 20 years, that the employee of a private contractor does not qualify as a "public safety officer" within the meaning of PSOBA.

The claimants then sought review of the BJA's decision in the Court of Federal Claims. The court held that the BJA's decision was erroneous and granted the claimants' motion for judgment on the administrative record, awarding them $ 250,000 in benefits.

The court noted that PSOBA defines a "public safety officer" as "an individual serving a public agency in an official capacity," 42 U.S.C. § 3796b(9)(A), and that in a 1981 policy directive, the BJA stated that in order "to be serving a public agency in an official capacity, one must be an officer, employee, volunteer, or [in a] similar relationship of performing services as part of a public agency," and that to have such a relationship with a public agency, "an individual must be officially recognized or designated as functionally within or a part of the public agency." Measuring Mr. Groff's service against that test, the court found that he was not an "employee" of the California Department of Forestry and Fire Protection, but that he was in a "similar relationship of performing services as part of" the California agency and that he was "officially recognized or designated as functionally within or a part of" that agency.

Based on those findings and on the court's conclusion that the statute could not properly be construed to exclude all contract employees from coverage, the court held that the claimants were entitled to benefits based on Mr. Groff's death. The court therefore entered judgment for the plaintiffs for the death benefits payable under the PSOBA statute. The government has taken an appeal from that decision.

B

Craig LaBare was a pilot employed by Hawkins & Powers Aviation, Inc., a private aviation service. Hawkins & Powers Aviation entered into a contract with the U.S. Forest Service to provide airtankers for the suppression of fires. Under the contract, the company was responsible for aircraft equipment, maintenance, safety, and flight crews. The contract also stated that the company was required to obtain liability insurance and would "be responsible for all damage to property and to persons."

While Mr. LaBare was piloting an airtanker pursuant to the contract, the wings of his aircraft detached, causing a fatal crash. Following his death, his wife Laurie LaBare filed a claim for PSOBA benefits. The BJA denied the claim, on the grounds that Mr. LaBare, as the employee of a government contractor, was not a "public safety officer" serving a public agency "in an official capacity" within the meaning of PSOBA. Like the claimants in the *Groff* case, Ms. LaBare obtained a hearing and two levels of review within the BJA, but her claim was rejected, first by a hearing examiner and then by the Director of the BJA.

Ms. LaBare sought review in the Court of Federal Claims. The court, acting through a different judge from the one assigned to the *Groff* case, affirmed the BJA's decision.

The court in *LaBare* looked to whether the decision of the BJA denying Ms. LaBare's claim was supported by substantial evidence. The court noted that the BJA defined the term "public safety officer" in PSOBA to exclude employees of private companies, even if they were killed while working with public agencies and engaged in fire suppression.

The court observed that PSOBA did not define what it means to be "serving a public agency in an official capacity." Relying on this court's decision in *Chacon v. United States*, 48 F.3d 508 (Fed. Cir. 1995), the trial court held that the BJA's interpretation of the statute, as expressed in prior decisions of the agency and summarized in a BJA publication, is entitled to deference under the principles of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Under the BJA's interpretation of the statute, in order to qualify as a "public safety officer" the individual in question must be an "officer, employee, volunteer, or similar relationship of performing services as a part of a public agency" and must be "officially recognized or designated as functionally within or a part of the public agency." In this case, the court concluded, substantial evidence supported the BJA's conclusion that Mr. LaBare, as an employee of a private contractor, was never officially recognized as a government employee or acknowledged as "functionally" a part of the Forest Service. The court therefore

denied Ms. LaBare's claim for PSOBA benefits. Ms. LaBare has appealed from that decision.

II

A

PSOBA provides that in any case in which the BJA "determines, under regulations issued pursuant to [the statute], that a public safety officer has died as the direct and proximate result of a personal injury sustained in the line of duty, the [BJA] shall pay a benefit of $ 250,000." 42 U.S.C. § 3796(a). PSOBA further provides that the BJA "is authorized to establish such rules, regulations, and procedures as may be necessary to carry out the purposes of [the statute]" and that those rules, regulations, and procedures "will be determinative of conflict of laws issues arising under [the statute]." *Id.* § 3796c.

Pursuant to that statutory authority, the BJA has promulgated regulations implementing the statute. The procedural regulations set up a mechanism for claimants to submit claims to the BJA and provide that claimants are entitled to representation in prosecuting their claims. 28 C.F.R. § 32.22(a) (2006). n1 The regulations prescribe a three-stage process for adjudicating claims. First, following the claimant's submission of a claim and any evidence pertinent to the claim, the BJA makes a finding as to the proper disposition of the claim. *Id.* § 32.23. If the finding is one of ineligibility, the BJA is required to make findings of fact and conclusions of law supporting the decision. *Id.*

After notice of the BJA's finding of ineligibility, the claimant is entitled to ask the BJA for reconsideration.

As part of the reconsideration proceeding, the claimant is entitled to a hearing before a hearing officer at which the claimant may introduce evidence. 28 C.F.R. § 32.24 (2006). Although the hearing is not governed by formal rules of procedure, the hearing officer is required to conduct the hearing "in such manner as to best ascertain the rights of the claimant" and is required to "receive such relevant evidence as may be introduced by the claimant and shall, in addition, receive such other evidence as the hearing officer may determine to be necessary or useful in evaluating the claim." The hearing is required to be recorded and a transcript prepared. *Id.* § 32.24(c). Following the hearing, the hearing officer is required to make a determination of eligibility, setting forth the findings of fact and conclusions of law supporting the hearing officer's determination. *Id.* § 32.24(g).

Following that determination, the claimant may request that the Director of the BJA review the record and the hearing officer's determination; the Director may also conduct such a review on his or her own motion. At that point, the claimant may comment on the record and offer new evidence or argument. The Director is then required to make a final determination of eligibility, setting forth the findings of fact and conclusions of law supporting the Director's determination. 28 C.F.R. § 32.24(h), (i).

As noted, the agency's final decision is subject to judicial review in the Court of Federal Claims and then in this court. The courts' review of the BJA's denial of a claim for death benefits is limited to three inquiries: (1) whether there has been substantial compliance with the statutory requirements and provisions of implementing

regulations; (2) whether there has been any arbitrary or capricious action on the part of the government officials involved; and (3) whether substantial evidence supports the decision denying the claim. *Amber-Messick v. United States*, 483 F.3d 1316, 1321 (Fed Cir. 2007); *Chacon*, 48 F.3d at 511. In the present cases, our review focuses on the first issue--whether the BJA complied with the statutory requirements and the governing regulations in denying the claims. In particular, we must assess whether the BJA acted lawfully when it determined that neither Mr. Groff nor Mr. LaBare was a "public safety officer" within the meaning of PSOBA and therefore that the claimants were not entitled to the statutory benefits.

B

The government asserts that we are obligated to apply the standard of deference articulated in *Chevron* to the BJA's determination that a privately employed pilot under contract to render fire suppression assistance to a public agency is not a "public safety officer" within the meaning of PSOBA.

The *Chevron* doctrine of judicial deference to an administrative agency's interpretation of a statute is based on the observation that "the power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron*, 467 U.S. at 843, *quoting Morton v. Ruiz*, 415 U.S. 199, 231, 94 S. Ct. 1055, 39 L. Ed. 2d 270 (1974). As the Supreme Court stated recently, "When an agency fills such a 'gap' reasonably, and in accordance with other applicable (*e.g.*, proce-

dural) requirements, the courts accept the result as legally binding." *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 168 L. Ed. 2d 54, 2007 U.S. LEXIS 7717, *14 (U.S. 2007). In *United States v. Mead Corp.*, the Supreme Court explained that

> administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent. 533 U.S. 218, 226-27, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001). The core issue in deciding whether *Chevron* deference is warranted is whether "Congress meant to delegate to the agency the authority to make determinations having the force of law." *Cathedral Candle Co. v. United States ITC*, 400 F.3d 1352, 1361 (Fed. Cir. 2005); *see also Long Island Care at Home*, 127 S. Ct. 2339, 2007 U.S. LEXIS 7717, *26; *Mead*, 533 U.S. at 226-27; *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000). In *Mead*, the Court explained that its cases had recognized that a very good indicator of congressional intent to delegate lawmaking authority and trigger *Chevron* deference could be found in "express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." 533 U.S. at 229.

In PSOBA, Congress expressly authorized the BJA to "determine[], under regulations issued pursuant to [the Act], that a public safety officer has died as the direct and proximate result of a personal injury sustained in the line of duty," 42 U.S.C. § 3796(a), and to "establish such rules, regulations, and procedures as may be necessary to carry out the purposes of [the Act]," *id.* § 3796c(a). We have previously concluded that Congress's grant of that authority to the BJA reflects Congress's expectation that the BJA would "be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law," *Mead*, 533 U.S. at 229, and that the BJA's interpretations of the statutory terms accordingly should receive *Chevron* deference. *Amber-Messick*, 483 F.3d at 1323; *Chacon*, 48 F.3d at 512.

The claimants attempt to distinguish *Amber-Messick* on the grounds that the dispute in that case turned on the interpretation of a regulation promulgated through traditional notice-and-comment rulemaking, and that the claimant did not challenge the applicability of *Chevron*. They distinguish *Chacon* on the ground that it was decided before the Supreme Court interpreted *Chevron* restrictively in *Mead* and *Christensen*. Those distinctions are unavailing. *Amber-Messick* and *Chacon* are consistent with the principles of *Mead* and *Christensen*. While *Christensen* held that the procedural safeguards of notice-and-comment rulemaking are sufficient to establish that *Chevron* deference is appropriate, the Supreme Court in later cases has made clear that *Chevron* deference is not limited to formally promulgated regulations. *See Barnhart v. Walton*, 535 U.S. 212, 221-22, 122 S. Ct. 1265, 152 L. Ed. 2d 330 (2002); *Mead*, 533 U.S. at 230-31. Moreover, the BJA interpretation of PSOBA

that was at issue in *Amber-Messick*--the BJA's ruling that the statute's definition of "firefighter" did not include a fourteen-year-old "apprentice firefighter" who was prohibited from actively engaging in the suppression of fires--was announced for the first time not through notice-and-comment rulemaking but in the adjudication of Ms. Amber-Messick's claim. In this case, we make explicit what was implicit in our prior decisions in *Chacon* and *Amber-Messick*: that Congress intended for the BJA's statutory interpretations announced through adjudication to have the force of law, and that those interpretations are therefore entitled to deference under *Chevron*. n2

Our conclusion in this regard is consistent with the analysis in *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372 (Fed. Cir. 2001), a post-*Mead* case in which we held that *Chevron* deference is due to the Department of Commerce's interpretation of ambiguous statutory terms articulated in the course of administrative antidumping determinations. In *Pesquera*, we held that an administrative antidumping proceeding is the kind of "relatively formal administrative procedure" that the Supreme Court in *Mead* characterized as qualifying for *Chevron* deference. 266 F.3d at 1380. In particular, the *Pesquera* court noted that Commerce's antidumping proceedings were relatively formal, that Congress delegated authority to Commerce to review and determine the amount of any antidumping duty, that the proceeding before Commerce was subject to judicial review based on the administrative record, and that Commerce considered its administrative determinations to be precedential.

Essentially the same factors are present with regard to administrative adjudications before the BJA. First, Congress has expressly delegated to the BJA the duty to determine, pursuant to PSOBA and the BJA's regulations, whether a public safety officer has died or become disabled as a result of a personal injury suffered in the line of duty and to make various adjustments in the benefit payments. The statute expressly authorized the BJA to issue regulations governing the representation of claimants in claims proceedings before the BJA; it authorized the BJA to use appropriated funds to conduct appeals of death and disability claims; it empowered the BJA to use administrative and investigative assistance from state and local agencies in making its determinations; and it provided that responsibility for making final determinations would rest with the BJA and that the BJA's rules, regulations, and procedures would be determinative of all conflicts of laws arising under the statute. 42 U.S.C. § 3796c. The statute thus contemplates the creation by regulation of an administrative process of some complexity, involving investigative actions, findings of fact, the determination and application of legal standards, the creation of administrative appeal proceedings, and the exercise of a degree of discretion as to adjustments and interim payments of benefits. Under these circumstances, it is reasonable to conclude that Congress contemplated that the BJA would use the process of adjudicating claims to make those legal determinations that would be necessary to fill gaps in the statutory standards. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25, 119 S. Ct. 1439, 143 L. Ed. 2d 590 (1999).

Second, as the statute appears to contemplate, the administrative procedure that the BJA has created for

adjudicating PSOBA claims is relatively formal. As noted, the claimant has a right to pursue the claim through three administrative stages. The claimant has a right to representation throughout and has a right to a full evidentiary hearing before a hearing examiner at the second stage. At each stage the BJA is required to make written findings of fact and conclusions of law to explain its decision. The final stage is a proceeding before the Director of the BJA. Like the antidumping proceeding at issue in *Pesquera*, the adjudicative proceeding in PSOBA claim cases is formal and culminates in a formal written decision by the head of the agency, not a nonbinding disposition by a low-level agency official. *See Mead*, 533 U.S. at 233-34.

Third, as has been recognized for more than 20 years, the BJA's decisions on PSOBA benefit claims are subject to review in the Court of Federal Claims. *Demutiis*, 291 F.3d at 1376; *Wydra v. Law Enforcement Assistance Admin.*, 232 U.S. App. D.C. 348, 722 F.2d 834, 837 (D.C. Cir. 1983). That review is conducted based on the administrative record. *See, e.g., Yanco v. United States*, 258 F.3d 1356, 1362 (Fed. Cir. 2001); *Chacon*, 48 F.3d at 511.

Fourth, the BJA treats at least some of its decisions on issues arising under the statute as creating precedents that govern later decisions in similar cases. This is such an instance, as the BJA's decision in this case is predicated on a 1980 administrative decision in which the BJA's predecessor agency denied a claim by the survivor of a contract pilot who died while engaged in firefighting in support of a federal agency. The 1980 decision, moreover, is codified along with other administrative determinations in a BJA document entitled *Legal*

Interpretations of the Public Safety Officers' Benefits Act, which the BJA relies on and which has been cited as precedent by this court. *SeeChacon*, 48 F.3d at 512. The administrative record thus reflects that the BJA's position with respect to contract employees is one of longstanding duration and that the agency has given the question "careful consideration . . . over a long period of time," which supports the conclusion that "*Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue." *Barnhart*, 535 U.S. at 222. In sum, based on the Supreme Court's decisions in *Mead*and *Barnhart*, this court's decisions in *Chacon* and *Amber-Messick*, and the analysis of this court in an analogous setting in *Pesquera*, we hold that the adjudicative determinations that Congress contemplated that the BJA would conduct are sufficiently formal to be entitled to *Chevron* deference.

C

Our inquiry under the *Chevron* standard is twofold. First, we must determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

The precise issue in this case is whether the term "public safety officer" as used in the statute includes pri-

vately employed pilots such as Mr. LaBare and Mr. Groff who render fire suppression assistance pursuant to contracts between their employers and public agencies. The Act defines "public safety officer" as "an individual serving a public agency in an official capacity, with or without compensation, as a law enforcement officer, as a firefighter, as a chaplain, or as a member of a rescue squad or ambulance crew." 42 U.S.C. § 3796b(9)(A). Congress did not further define what it means to serve "in an official capacity," leaving the statute silent as to whether contract pilots fall within its ambit.

The BJA, however, has addressed the question several times since the enactment of the statute. The issue appears to have first arisen in the 1980 case referenced above, which involved a claim filed by the widow of a contract pilot, Mr. Holstine, who died while participating in California Department of Forestry firefighting operations. The BJA's predecessor agency construed the term "public safety officer" using the following language:

In order to be serving a public agency in an official capacity one must be an officer, employee, volunteer, or similar relationship of performing services as part of a public agency. To have such a relationship with a public agency, an individual must be officially recognized or designated as functionally within or a part of the public agency. U.S. Department of Justice, Office of Justice Assistance, Research, and Statistics, *Legal Interpretations of the Public Safety Officers' Benefits Act* 9 (1981) (reprinting the *Holstine* decision). The LEAA concluded that the pilot, by virtue of being the employee of a government contractor, did not have such a relation-

ship to the agency. In resolving the claims at issue in the *Groff* and *LaBare* cases, the BJA followed that precedent and again concluded that contract pilots rendering fire suppression assistance to public agencies are not serving in an official capacity within the meaning of PSOBA.

We hold that the BJA's interpretation is a permissible construction of the statute. As we observed in *Amber-Messick*, the drafters of PSOBA were concerned with ensuring that both volunteer and public employee firefighters were included within the scope of the Act. *See Amber-Messick*, 483 F.3d at 1324. It was reasonable for the BJA to conclude that Congress intended for the phrase "in an official capacity" to capture those groups while excluding privately employed individuals. Moreover, the legislative history confirms that this is, at a minimum, a plausible interpretation of the statute. The Act's sponsor in the House of Representatives, Representative Eilberg, stated that the bill would not apply to "privately employed safety and security officers," both as a general matter and in the particular scenario in which those officers "were called by a local arm of the government or the local police organization to assist in any way." 122 Cong. Rec. 12,002, 12,009 (1976). n3 The Supreme Court has cautioned that "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history," *Chrysler Corp. v. Brown*, 441 U.S. 281, 311, 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979), and we do not suggest that the quoted remark is conclusive evidence of the statute's scope. Nevertheless, it is difficult to reconcile Representative Eilberg's statement with the claimants' assertion that the congressional intent to include privately employed individuals within PSOBA's coverage is so clear as to

make the BJA's interpretation unsustainable under *Chevron*. At a minimum, the legislative history reinforces the notion that the statutory text is open to the interpretation adopted by the BJA in its adjudicative determinations.

The claimants suggest that the issue in these cases should be characterized as whether Congress manifested an intent to exclude contract firefighters, rather than an intent to include them within PSOBA's coverage. Such a semantic distinction, however, does not alter the analysis. Absent some indication otherwise, "Congress' silence is just that--silence." *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 749, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989), quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686, 107 S. Ct. 1476, 94 L. Ed. 2d 661 (1987). Here, Congress has expressed neither an unambiguous intention to include nor an unambiguous intention to exclude the employees of contractors from the Act's coverage. Because the statute is silent on that issue, and because the BJA's interpretation is reasonable, we must defer to the agency's construction of the statute.

III

The claimants further contend that in denying the claims in these cases the BJA has misapplied its own criteria for awarding benefits. Even accepting as reasonable the BJA's definition of serving "in an official capacity," as first articulated in *Holstine*, *see Chacon*, 48 F.3d at 512, the claimants argue that Mr. LaBare and Mr. Groff were each "officially recognized or designated as functionally within or a part of" public agencies, as those terms were used in *Holstine*. We disagree.

The claimants cite several facts in support of their argument. In Mr. LaBare's case, his piloting activity was governed by numerous federal regulations and guidelines that provide protocols for missions and base operations. Contract pilots required Forest Service approval and were obligated to comply with the same Forest Service guidelines applicable to government pilots. And after Mr. LaBare's death, the Forest Service submitted a report to the BJA that listed the Forest Service as Mr. LaBare's employer. Similarly, Mr. Groff was subject to pre-approval by the California Department of Forestry and Fire Protection, and he operated under the auspices of both state and federal regulations as well. After Mr. Groff's death, the California agency issued an opinion in which it stated that he was an officially recognized member of that agency.

The undisputed facts, however, show that both Mr. LaBare and Mr. Groff were hired, paid, and subject to termination by their private employers. The contract between the California agency and San Joaquin Helicopters required the company to maintain liability insurance for its activities and stated that contract pilots such as Mr. Groff "shall act in an independent capacity and not as officers or employees or agents of the State of California." Similarly, the contract between Hawkins & Powers Aviation and the Forest Service required the company to obtain liability insurance and maintain responsibility for "all damage to property and to persons." The BJA reasonably concluded that neither the government regulation and oversight nor the post-mortem statements of the Forest Service and the California Department of Forestry and Fire Protection transformed Mr. LaBare and Mr. Groff from contract pilots into government employees.

Moreover, the *Holstine* definition was an explicit restatement of the conclusion that privately employed contract pilots did not serve public agencies "in an official capacity." It does not give due respect to the administrative interpretation of the statute to say that the rule formulated by the agency does not apply to the very fact pattern for which the rule was designed. The BJA consistently applied its own rule when it concluded that, as employees of government contractors, Mr. LaBare and Mr. Groff were not public safety officers within the meaning of PSOBA. To uphold the BJA's legal interpretation of the PSOBA statute means that contract pilots cannot be treated as "serving a public agency in an official capacity."

For the foregoing reasons, the judgment in *Groff* is reversed and the judgment in *LaBare* is affirmed.

Each party shall bear its own costs for these appeals.

No. 2006-5141, REVERSED.

No. 2007-5006, AFFIRMED.

Footnotes

1In August 2006, BJA promulgated new regulations that made some changes in the procedures for administrative review of PSOBA claims. *See* 71 Fed. Reg. 46,028 (Aug. 10, 2006). Those regulations were not in effect at the time that the agency decided these cases. We cite to the former version of the procedural regulations in this opinion, not the version of the regulations incorporating the August 2006 changes.

2We do not rest our decision to apply the *Chevron* doctrine in this case on the BJA's regulations or its inter-

pretation of its regulations. To be sure, the BJA had a regulation in effect at the time of the administrative proceedings in these cases that defined the term "public safety officer" in terms that tracked the statutory language. *See* 28 C.F.R. § 32.2(j) (2002) ("Public safety officer means any individual serving a public agency in an official capacity, with or without compensation, as a law enforcement officer, firefighter, rescue squad member or ambulance crew member."). While an agency's interpretation of its own regulation is normally entitled to substantial deference, *Auer v. Robbins*, 519 U.S. 452, 461-63, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997), the *Auer* standard does not apply when the regulation "does little more than restate the terms of the statute itself." *Gonzales v. Oregon*, 546 U.S. 243, 257, 126 S. Ct. 904, 163 L. Ed. 2d 748 (2006). "[T]he existence of a parroting regulation does not change the fact that the question . . . is not the meaning of the regulation but the meaning of the statute." *Id.* For that reason, we do not base our decision on the fact that the BJA promulgated such a "parroting" regulation and interpreted it to exclude contract employees.

We also do not rest our decision on the revised version of the BJA's regulations, adopted in August 2006, which provide more detailed guidance as to the meaning of the statutory term "public safety officer." The revised regulation, 28 C.F.R. § 32.3 (effective Sept. 11, 2006), reflects the BJA's earlier adjudicative determinations and makes clear that contract employees such as Mr. Groff and Mr. LaBare would not be regarded as public safety officers within the meaning of the statute. However, the government did not argue that the new regulation could serve as a basis for upholding the BJA's determinations in these cases, and at oral argument the gov-

ernment expressly declined to rely on the new regulation. Accordingly, we do not rely on that regulation as the basis for our decision, although we note that the Supreme Court has held that legal positions taken in properly promulgated regulations are entitled to *Chevron* deference even if the regulations are promulgated after the administrative decision in question, and indeed even if they are promulgated in response to the very litigation that is under review. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740-41, 116 S. Ct. 1730, 135 L. Ed. 2d 25 (1996); *United States v. Morton*, 467 U.S. 822, 836 n. 21, 104 S. Ct. 2769, 81 L. Ed. 2d 680 (1984).

3Representative Eilberg's statement was made during the debate on a version of the bill that applied only to law enforcement officers, before it was merged with a companion bill covering firefighters. The statement is nevertheless informative, because the bill at that time contained the relevant "in an official capacity" language. *See* 122 Cong. Rec. 12,002, 12,013 (1976).

No. 05-1049C

UNITED STATES COURT OF FEDERAL CLAIMS

CHRISTINE WELLS GROFF and MICHAEL WELLS,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

July 27, 2006, Filed

COUNSEL: Daniel Q. Poretti, Minneapolis, MN, for plaintiffs. Steven M. Sitek, Minneapolis, MN, of counsel.

Timothy P. McIlmail, with whom were Peter D. Keisler, Assistant Attorney General, David M. Cohen, Director, Jeanne E. Davidson, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant. Victoria O'Brien, Office of General Counsel, Office of Justice Programs, United States Department of Justice, Washington, DC, of counsel.

JUDGES: LYNN J. BUSH, Judge.

OPINION BY: LYNN J. BUSH

OPINION

BUSH, *Judge*

The court has before it the parties' cross-motions for judgment on the administrative record. Plaintiffs contest the denial by the Bureau of Justice Assistance of the United States Department of Justice (BJA) of benefits under the Public Safety Officers' Benefits Act of 1976, *42 U.S.C. §§ 3796-3796d-7* (2000 & Supp. III 2003, as amended) (PSOBA) for the survivors of Mr. Lawrence Groff. The motions have been fully briefed, and oral argument was heard on June 1, 2006. Plaintiffs' motion, for the reasons discussed below, is granted.

BACKGROUND[1]

Plaintiffs request compensation under PSOBA for the death of Mr. Lawrence Groff, the husband of Mrs. Christine Wells Groff and the step-father of Michael Wells. From April 7, 1997 through August 27, 2001, Mr. Groff was employed by San Joaquin Helicopters (SJH), a California corporation, which provides pilots to the California Department of Forestry and Fire Protection (CDF). On August 27, 2001, Mr. Groff was piloting an aerial firefighting tanker, helping to suppress a wildfire near Hopland, California. Although Mr. Groff was employed by SJH, the airtanker he was piloting was owned by the CDF. Tragically, Mr. Groff's airtanker collided with another aircraft in mid-air, and he died as a result of the collision.

On August 21, 2002, Mrs. Groff applied for PSOBA survivors' benefits for herself and her son. Administrative Record (AR) at 3-4. On October 31, 2002, the BJA denied plaintiffs' claim, finding that Mr. Groff "was not functioning as a public safety officer as defined by the PSOB Act and set forth in the PSOB regulations" at the time of his death, and that his survivors were thus not entitled to benefits under the statute. *Id.* at 134. Mrs.

Groff appealed that ruling, arguing, it appears from the record, that her husband "was, in fact, serving a public agency [the CDF] in an official capacity as a fire fighter." *Id.* at 188. The denial of PSOBA benefits was sustained by the hearing officer on February 20, 2004. *Id.* at 191.

On February 9, 2005, Mrs. Groff appealed the hearing officer's decision to the Director of the BJA. She argued that she and her son "should receive benefits under the PSOBA because the Act does not require that her late husband be directly employed by a public agency." *Id.* at 152. The BJA Director affirmed the hearing officer's decision that Mrs. Groff and her son were ineligible for PSOBA benefits. *Id.* at 905. On September 29, 2005, plaintiffs filed suit in this court to challenge the final agency determination by the BJA denying PSOBA benefits.

DISCUSSION

I. Jurisdiction

Plaintiffs assert jurisdiction under the Tucker Act, *28 U.S.C. § 1491 (2000)*, and the money-mandating provisions of PSOBA. Plaintiffs state that they have exhausted all administrative remedies. Defendant does not dispute jurisdiction. A final decision of the BJA Director denying PSOBA benefits is subject to review in this court. *Demutiis v. United States, 291 F.3d 1373, 1376 (Fed. Cir. 2002).*

II. Standard of Review for a Motion for Judgment on the Administrative Record

Rule 52.1 of the Rules of the United States Court of Federal Claims (RCFC) provides for judgment on the administrative record. [2] To review a motion, or cross-motions, under *RCFC 52.1*, the court asks whether, given all the disputed and undisputed facts, a party has met its burden of proof based on the evidence in the record. *Bannum, Inc. v. United States, 404 F.3d 1346, 1356 (Fed. Cir. 2005)*. The court must make fact findings where necessary. *Id.* The resolution of *RCFC 52.1* cross-motions is akin to an expedited trial on the paper record. *Id.*

Subsequent to the final decision of the BJA Director,

> [j]udicial review of a BJA denial of death benefits under [PSOBA] is limited to three inquiries: "(1) whether there has been substantial compliance with statutory [sic] and implementing regulations; (2) whether there has been any arbitrary or capricious action on the part of the Government officials involved; and (3) whether there was substantial evidence supporting the decision."

Chacon v. United States, 48 F.3d 508, 511 (Fed. Cir. 1995) (quoting *Morrow v. United States, 647 F.2d 1099, 1102, 227 Ct. Cl. 290 (Ct. Cl. 1981)).*

III. Analysis

A. PSOBA Benefits

PSOBA provides, *inter alia*, a one-time cash payment [3] to the survivors of public safety officers who die "in the line of duty":

> In any case in which the Bureau of Justice Assistance . . . determines, under regulations issued pursuant to this subchapter, that a public safety officer has died as the direct and proximate result of a personal injury sustained in the line of duty, the Bureau shall pay a benefit of $ 250,000, adjusted in accordance with *subsection (h)* of this section . . . .

42 U.S.C. § 3796(a). The definition of public agencies, whose public safety officers qualify for a death benefit if an officer is killed in the line of duty, is provided by the statute:

> "[P]ublic agency" means the United States, any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, Guam, American Samoa, the Trust Territory of the Pacific Islands, the Commonwealth of the Northern Mariana Islands, and any territory or possession of the United States, or any unit of local government, department, agency, or instrumentality of any of the foregoing . . . .

42 U.S.C. § 3796b(8) (formerly codified at *42 U.S.C. § 3796b(7)*). A public safety officer is defined by PSOBA, in relevant part, to be

> an individual serving a public agency in an official capacity, with or without compensation, as a law enforcement officer, as a firefighter, as a chaplain, or as a member of a rescue squad or ambulance crew . . . .

42 U.S.C. § 3796b(9)(A) (formerly codified at *42 U.S.C. § 3796b(8)(A)*). The question raised by the cross-motions before the court is whether Mr. Groff was a public safety officer, as defined by PSOBA, at the time of his death.

B. Serving a Public Agency in an Official Capacity Further Defined

The language "serving a public agency in an official capacity" is not defined in PSOBA or in PSOBA's implementing regulations. *See Chacon, 48 F.3d at 511* ("The Act does not, however, define what it means to 'serv[e] in an official capacity.'"). [4] Nonetheless, the United States Department of Justice has had occasion to interpret this language over the years, and has memorialized these interpretations in a policy letter compiling its rulings in various cases. *See Department of Justice, Office of Justice Programs, Public Safety Officers' Benefits Program, 70 Fed. Reg. 43078, 43080* (proposed rules of July 26, 2005, to be codified at 28 C.F.R. Part 32) (describing the BJA policy letter as based, at least in part, "on the considerable and broad-ranging experience and expertise BJA has derived from innumerable claims"). The BJA's "internal agency policy, practice, and guidance . . . have come increasingly to inform the agency's decision-making, gradually taking on significant authority." *Id.* Thus, "since November

1981, the [BJA policy letter], Legal Interpretations of the Public Safety Officers' Benefits Act, has been a guiding authority for BJA, program hearing officers, [Office of Justice Programs], and the judiciary." *Id.*

In particular, the 1981 BJA policy letter provides a two-sentence definition of serving a public agency in an official capacity:

> In order to be serving a public agency in an official capacity one must be an officer, employee, volunteer, or [in a] similar relationship of performing services as a part of a public agency. To have such a relationship with a public agency, an individual must be officially recognized or designated as functionally within or a part of the public agency.

AR at 138. This gloss on the statutory language of PSOBA has been described as a "regulatory definition" entitled to *Chevron* deference by the United States Court of Appeals for the Federal Circuit. *Chacon, 48 F.3d at 512* (citing *Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 844, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)).* [5] The Federal Circuit found "nothing unreasonable" in this BJA statement establishing the criteria for individuals who fit within the public safety officer definition in PSOBA. *Id.* It is against this BJA interpretation of "serving a public agency in an official capacity" that Mr. Groff's performance of services for the CDF must be measured.

C. Was Mr. Groff Performing Services as an Officially Recognized Part of a Public Agency?

Plaintiffs argue that Mr. Groff was a part of the CDF and that he fell within the BJA interpretation of the PSOBA definition of a public safety officer. Pls.' Mot. at 2. Plaintiffs assert that "[t]here is little or no dispute regarding the overwhelming evidence which demonstrates Mr. Groff was officially recognized and functionally within or a part of the CDF when he died in the line of duty." *Id.* To succeed in their suit, plaintiffs must show that Mr. Groff was performing services as a part of the CDF much like an employee, and that Mr. Groff was officially recognized by the CDF as being functionally within or a part of the CDF.

1. Mr. Groff Was Not a CDF Employee

As an initial matter, it is clear from the evidence and arguments of the parties that Mr. Groff was an employee of San Joaquin Helicopters (SJH). The agreement between SJH and the CDF explicitly sets forth the status of SJH employees:

> The Contractor [SJH], and the agents and employees of the Contractor, in the performance of the agreement, shall act in an independent capacity and not as officers or employees or agents of the State of California.

AR at 799. Mr. Groff was hired by SJH in 1997 and was an SJH employee when he died on August 27, 2001. AR at 719, 762; Def.'s Facts P 8; Pls.' Mot. at 1 (acknowledging "Mr. Groff's private employment via a contract with the CDF").

Plaintiffs present, as an alternative argument, that Mr. Groff should be deemed a CDF employee because of the level of control exercised over Mr. Groff by the CDF. Pls.' Mot. at 12. The court agrees with plaintiffs that the BJA interpretation of "serving a public agency in an official capacity" is broader than "a test of employment or to establish vicarious liability," *id.* at 6, and that a test of employment status is not the most relevant inquiry here, *id.* at 25. The court notes, however, that being an employee of a public agency, and being in a similar relationship of performing services as a part of a public agency, are two separate and alternative categories which fall within the BJA interpretation of "serving a public agency in an official capacity." Therefore, in the interest of thoroughness, the court examines plaintiffs' argument that Mr. Groff was, "in fact and in law," a CDF employee. *Id.* at 12.

Plaintiffs cite five court decisions that discuss control of an employer over a person and how control may be used as a factor in determining whether that person is an employee. Pls.' Mot. at 21, 25. In the first case cited by plaintiffs, the Supreme Court ruled that control may be a factor in determining whether a partner of a professional corporation is also an employee for Americans with Disabilities Act of 1990 (ADA) purposes. *Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 449, 123 S. Ct. 1673, 155 L. Ed. 2d 615 (2003).* However, Mr. Groff's situation as an employee of a contractor working for a public agency is not analogous to that of a shareholder doctor in a medical clinic, and *Clackamas* sheds no light on Mr. Groff's employment status.

Plaintiffs also cite a number of "independent contractor" cases. The Supreme Court has said, in one cited

example, that a court must "'consider the hiring party's right to control the manner and means by which the product is accomplished'" to determine who is an employee for Employee Retirement Income Security Act of 1974 (ERISA) purposes. *Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323, 112 S. Ct. 1344, 117 L. Ed. 2d 581 (1992)*(quoting *Cmty. For Creative Non-Violence v. Reid, 490 U.S. 730, 751, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989)).* However, Darden was an insurance agent for a large insurance company, not an employee of a contractor engaged by a government agency, and as a consequence *Darden* provides no guidance as to Mr. Groff's employment status.

The Supreme Court ruled, in another case cited by plaintiffs, that the nature of a person's working environment, for example whether that person's role is integrated into a production line, is a factor in deciding whether that person is an employee or an independent contractor for Fair Labor Standards Act of 1938 (FLSA) purposes. *Rutherford Food Corp. v. McComb, 331 U.S. 722, 726-30, 67 S. Ct. 1473, 91 L. Ed. 1772 (1947).* But the Court also noted in *McComb* that in different circumstances, "[t]here may be independent contractors who take part in production or distribution who would alone be responsible for the wages and hours of their own employees." *Id. at 729* (citations omitted). In *McComb* the meat de-boners divided among themselves a piecework fee from the company. *Id. at 725.* SJH operated differently, offering Mr. Groff wages, benefits and the other indicia of employment. Thus, *McComb* is not on point, either.

In another "independent contractor" case cited by plaintiffs, the Supreme Court of California found that certain agricultural workers were not independent con-

tractors for workers' compensation coverage purposes, despite signing an agreement that labeled them as independent contractors. *S. G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 48 Cal. 3d 341, 256 Cal. Rptr. 543, 769 P.2d 399, 400 (Cal. 1989).* In this case, measuring the control by the grower of the agricultural operations was the principal test for determining whether these persons were the grower's employees. *Id. at 404.* There was, however, no contractor to broker the workers' services to the organization in need of them; the grower directly engaged the agricultural worker and his family to harvest cucumbers. *Id. at 401.* The court remarked that "courts have long recognized that the 'control' test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements." *Id. at 404.* Mr. Groff's contract pilot employment with SJH is an example from that "infinite variety of service arrangements" which is not resolved by the "independent contractor" analysis of cucumber harvesters offered in *S. G. Borello.*

Finally, plaintiffs cite a case which has some surface similarities to Mr. Groff's situation. The case involved a contract pilot, who hired both himself and his small plane to the United States Forest Service for thirty dollars an hour. *United States v. Becker, 378 F.2d 319, 320 (9th Cir. 1967).* The issue on appeal was whether the trial court had erred in finding that the pilot was an employee of the United States within the meaning of the Federal Tort Claims Act (FTCA). *Id. at 321.* The Ninth Circuit noted that some evidence tended to indicate that the pilot was an independent contractor, and other evidence tended to indicate he was an employee. *Id. at 321-22.* The appeals court also commented that the facts of the case were "so unique [as to make prece-

dent unhelpful]." *Id. at 323.* Under the "clearly erroneous" standard of review, the appellate panel stated that "we are not left with the definite and firm conviction that a mistake was committed by the trial court in making the ultimate finding that [the pilot] was serving as an employee of the United States at the time of the accident." *Id.*

In *Becker* there was no intervening corporation that had contracted with the Forest Service to provide pilots. This factual difference between *Becker* and the subject matter is not minor. SJH performed a not insubstantial function of limiting the CDF's liability in the case of airplane accidents. A provision of SJH's contract with the CDF stated that SJH would indemnify the CDF for any liability resulting from the actions of SJH's pilots, including any liability for injuries sustained by these pilots. AR at 799.

Even if *Becker* were perfectly analogous to this case, the Ninth Circuit has since criticized the employment status analysis in *Becker* because of intervening Supreme Court and Courts of Appeals precedent:

> [Plaintiff], however, fails to appreciate the extent to which *Becker* has been weakened by subsequent Supreme Court pronouncements. The Court has indicated that detailed regulations and inspections are no longer evidence of an employee relationship. In interpreting *Logue* and *Orleans*, our court has said that the ability to compel compliance with federal regulation does not change a contractor's personnel into federal employees. There must be substantial supervision over the day-to-day operations of the con-

> tractor in order to find that the individual was acting as a government employee.

Letnes v. United States, 820 F.2d 1517, 1518-19 (9th Cir. 1987) (citing the FTCA cases *United States v. Orleans, 425 U.S. 807, 815, 96 S. Ct. 1971, 48 L. Ed. 2d 390 (1976)*; *Logue v. United States, 412 U.S. 521, 529-30, 93 S. Ct. 2215, 37 L. Ed. 2d 121 (1973)*; *Ducey v. United States, 713 F.2d 504, 516 (9th Cir. 1983)*; *Lurch v. United States, 719 F.2d 333, 337 (10th Cir. 1983)*). The Ninth Circuit held that the decedent pilot Letnes, employed by a contractor engaged by the United States Forest Service, was not a Forest Service employee for FTCA purposes. *Letnes, 820 F.2d at 1519. Letnes* can be read to hold that evidence of required compliance with safety rules and regulations does not, by itself, show that agency control has transformed the contractor pilot into a public employee. [6]

At this point in the analysis, the court notes that none of the cases cited by plaintiffs, discussing an entity's control of a person who must then be deemed an employee of that entity, and none of the cases cited in *Letnes*, discussing the unimportance of evidence related to a contractor's compliance with safety rules and regulations in the determination of whether that person is an employee of a government agency, are concerned with the concept of "serving a public agency in an official capacity," as those terms are used in PSOBA. Instead, these cases inquire into a person's employee status for other purposes, to decide whether a person is an "employee," as that term is used in the ADA, ERISA, workers' compensation statutes, and the FTCA. When courts turn to common law measures of

control to determine who is, and who is not, an employee, it is to elucidate a functional definition of "employee" in the context of a particular statutory scheme. *See, e.g., Darden, 503 U.S. at 326* (stating that "the textual asymmetry between [FLSA and ERISA] precludes reliance on FLSA cases when construing ERISA's concept of employee"); *Orleans, 425 U.S. at 818* (rejecting the suggestion that the Economic Opportunity Act and the FTCA create a scheme which "convert[s] the local executors of a locally planned program or project which receives conditional federal funding into federal employees"). No universal, common law test of control, defining employee status for all statutory schemes, emerges from the caselaw before the court.

The cases cited by plaintiffs and the FTCA cases cited in *Letnes* do not, therefore, provide a definition of "employee" that is determinative in the context of PSOBA awards. The court can discern no legal standard applicable in the PSOBA context by which the court could measure the CDF's control over Mr. Groff and then determine whether that control establishes that Mr. Groff worked for the CDF as a CDF employee. The caselaw cited by plaintiffs has not persuaded the court that Mr. Groff was a CDF employee for PSOBA purposes.

2. Are the Survivors of Contractor Employees Eligible to Receive PSOBA Benefits?

The real dispute in this case, then, is whether Mr. Groff, an SJH employee, was nonetheless performing services as a part of the CDF much like a CDF employee and was officially recognized by the CDF as do-

ing so. The BJA concluded, when it applied the BJA's two-sentence interpretation of "serving a public agency in an official capacity," that a contractor employee such as Mr. Groff is not in a relationship to a public agency similar to the relationship of an employee of that public agency. *See* AR at 896 (Final Agency Determination) ("[T]he determinative issue in this claim is whether a privately-employed pilot rendering fire suppression assistance to a public agency under a contract with the public agency is covered by [PSOBA]."); *id.* at 901 ("BJA may not unilaterally extend the coverage of [PSOBA] to private sector workers."). The BJA has previously had occasion to apply the "similar relationship" and "official recognition" tests of its gloss on "serving a public agency in an official capacity" to the claim of the survivors of another contractor employee.

In 1980, the United States Department of Justice applied its interpretation of "serving a public agency in a official capacity" to the specific facts of a claim for PSOBA benefits by the survivors of a Mr. Holstine, who was working as a pilot. AR at 137-39. Like Mr. Groff, Mr. Holstine worked with the State of California fighting fires and died while firefighting. *Id.* at 137. Rejecting the Holstine claim, the Administrator's Final Decision held that Mr. Holstine did not fall within the BJA (then the Law Enforcement Assistance Administration) interpretation of employees who are "serving a public agency in an official capacity," because he was employed by a contractor, not by the State of California. *Id.* at 139. [7] Defendant asserts that the BJA's rejection of plaintiffs' claim here is consistent with the rejection in 1980 of the PSOBA claim related to Mr. Holstine's death. The court observes that these two agency decisions are consistent in their results, but notes that

the agency decisions are distinguishable, both on their facts [8] and, more significantly, because of statutory amendments [9] that have occurred in the years separating the two claims.

In addition to the two-sentence gloss on "serving a public agency in a official capacity," where the Department of Justice identified the "similar relationship" and "official recognition" tests, the 1981 policy letter includes the rest of the case summary of the rejection of the Holstine claim, from which those two sentences were extracted by the Federal Circuit in *Chacon. 48 F.3d at 512*; AR at 137-39. And while this court accords *Chevron* deference to that two-sentence definition of the statutory term, [10] the remainder of the reasoning expressed in the 1980 decision related to Mr. Holstine is naught but the BJA's unpublished interpretation, albeit a longstanding one, of the rights of the survivors of contractors under PSOBA. As such, the reasoning employed in the 1980 decision is entitled to *Skidmore* deference. *See Cathedral Candle Co. v. United States Int'l Trade Comm'n, 400 F.3d 1352, 1370 (Fed. Cir. 2005)* (stating that courts "give *Skidmore* deference to unpublished agency interpretations of statutes"). The court must accord the BJA's position on contractors under PSOBA "the weight [proportional to] the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944).*

The BJA reads PSOBA to deny that contractors perform services as a part of a public agency in a relationship similar to that of the agency's employees. AR at 891 (Final Agency Determination, quoting initial de-

nial determination) ("'The death of a privately-employed worker who has been contracted by a public agency is not covered by [PSOBA].'"). This reading derives from the BJA's analysis of the legislative intent of PSOBA. [11] AR at 138-39, 896 n.14, 897; Def.'s Reply at 14 ("Congress intended that privately-employed individuals-even privately employed individuals performing services of a security or safety nature who are called upon by public agencies to assist in their efforts-not be covered by the PSOBA."). Because the BJA's interpretation of PSOBA is entitled to *Skidmore* deference, the court will compare the BJA's analysis of legislative intent with its own review, and measure whether, under *Skidmore*, the BJA's conclusion that contractors are never public safety officers under PSOBA is persuasive. Indeed, this court must examine legislative history to discern congressional intent when ambiguous statutory terms permit contrary readings which would decide a case before it. *See Hoechst Aktiengesellschaft v. Quigg, 917 F.2d 522, 526 (Fed. Cir. 1990)* ("When faced with such ambiguity [opposing plausible interpretations] it is incumbent upon this court to examine the legislative history to discern Congress' intent."); *see also Yanco v. United States, 258 F.3d 1356, 1364-65 (Fed. Cir. 2001)*(examining the legislative history of PSOBA and upholding an implementing regulation because it was a permissible construction of the statute); *Harold v. United States, 634 F.2d 547, 549-52, 225 Ct. Cl. 168 & nn.4-5 (Ct. Cl. 1980)* (examining the legislative history of PSOBA and disagreeing with a Department of Justice interpretation of a statutory term because that interpretation "can[not] be construed as anything but a contradiction of the Congressional understanding of the [PSOBA] term").

a. The Legislative History of PSOBA Does Not Reveal an Intent to Categorically Exclude Contractor Firefighters from the Definition of Public Safety Officers

The legislative history of PSOBA indicates that PSOBA was intended by Congress to compensate the families of law enforcement personnel and firefighters who die during the course of their service. Congress recognized that public safety officers are not highly paid, and that they perform a public service at high risk of personal injury and death. In the words of Senator McClellan, one of the sponsors of the legislation creating PSOBA awards,

> In my opinion, the motivation for this legislation is obvious-public safety officers are constantly subjected to great physical risks, the financial and fringe benefits available to such officers are only moderate, and the officers are generally young and with growing families. The economic and financial burdens on the survivors of such an officer are often heavy.
>
> More than 200 policemen and firemen are killed each year in the performance of their duties.

122 Cong. Rec. 22633, 22634 (1976) (statement of Sen. McClellan). These sentiments are repeatedly echoed throughout PSOBA's legislative history, in both houses of Congress, and show that Congress wished to pay a

debt of gratitude to law enforcement personnel and firefighters who die in the performance of their duties.

Other considerations included improving the morale of firefighters and law enforcement personnel, and aiding the recruitment of new members into these professions. In the House, for example, there were numerous comments about the need for incentives to draw qualified people into law enforcement:

> As the figures indicate, law enforcement has become an increasingly hazardous profession. A law enforcement officer has the right to expect that his wife and his children will be financially secure should he lose his life while on the job. The fear of leaving a family uncared for is a disincentive to the type of individual responsible and high-quality law enforcement needs.
>
> We are not talking about volunteer lifeguards or individuals who with a momentary spurt of courage help out a neighbor or a friend, but people who devote their life to a dangerous career in order to promote the public safety.

122 Cong. Rec. 12002, 12017 (1976) (statement of Rep. Gude). When referring specifically to firefighters, supporters of PSOBA were concerned about morale:

> In addition to providing direct financial compensation to the dependents of deceased firefighters, it was indicated by most of the witnesses before the committee that this

> legislation will improve the morale of firefighting personnel.

Id. at 12022 (statement of Rep. Eilberg).

PSOBA supporters were also concerned about the recruitment of firefighters:

> I feel we must respond to the tragic loss of life by firefighters. Each day, these brave public servants lay their lives on the line, not knowing whether they will ever return to their families. As a group, they have never been highly paid and if they are killed, their dependents must rely on a patchwork system of State insurance programs and voluntary contributions by local citizens. If States and municipalities provided adequate life insurance this bill would not be needed, but such is not the case. The lack of financial security for one's dependents can discourage otherwise enthusiastic candidates from entering these dangerous professions.

Id. (statement of Rep. Fish). The same goal of aiding the recruitment and morale of public safety officers was expressed in the Senate:

> Clearly this bill will be an incentive to help in those recruitment [law enforcement and firefighting personnel] needs. The bill will not only aid in recruitment, but it will dramatically improve the morale of our public safety officers, morale which I believe needs an uplift.

122 Cong. Rec. 22633, 22644 (1976) (statement of Sen. Moss). Congress intended that PSOBA awards would help public agencies recruit firefighters and maintain their morale.

The version of the firefighter death benefit bill passed by the House referred, in pertinent part, to "any individual serving, with or without compensation, as a firefighter . . . [who dies while] actually and directly engaged in fighting a fire." 122 Cong. Rec. 12002, 12026 (1976). The parallel bill in the Senate, which covered both law enforcement personnel and firefighters, defined fireman to "include[] a person serving as an officially recognized or designated member of a legally organized volunteer fire department" and also defined an umbrella term, "public safety officer," to "mean[] a person serving a public agency in an official capacity, with or without compensation, as a law enforcement officer or a fireman." 122 Cong. Rec. 22633, 22633 (1976). The court notes that neither of these bill versions explicitly excludes contractors who serve as firefighters for a public agency. Because Mr. Groff was a firefighter, a category included in both bills under consideration in 1976, it is important to examine the floor debates on these bills to see if both houses of Congress came to a consensus as to whether firefighters who performed services as contractors for public agencies would be excluded from PSOBA coverage.

The BJA cites to one colloquy in the House, and one colloquy only, as proof of the legislative intent to exclude contractors from PSOBA:

> Rep. Myers: "Could the gentleman tell me, is there any way in which this bill would ap-

> ply to privately employed safety or security officers?"
>
> Rep. Eilberg: "No, it would not."
>
> Rep. Myers: "What if they were called by a local arm of the government or the local police organization to assist in any way?"
>
> Rep. Eilberg: "It is my opinion that they would not be included."

122 Cong. Rec. 12002, 12009 (1976); AR at 138-39; 896 n.14. This is extremely weak support for categorically excluding contractor firefighters from PSOBA, for the reasons discussed below. These few cited lines, out of hundreds of pages of the legislative history on these two bills in the House and Senate largely expressing gratitude to firefighters and law enforcement officers who sacrifice their lives in the line of duty, do not accurately mark the intent of Congress in granting or denying PSOBA benefits for the survivors of contractor firefighters.

First, this cited debate fragment is extracted from the House debate on the law enforcement officer death benefit bill, not the firefighter bill. Although the bills were companion bills, at this point in the House consideration of the two bills the language identifying covered firefighters was different from the language identifying covered law enforcement personnel. *Compare* 122 Cong. Rec. 12002, 12026 (1976) (including "any individual serving, with or without compensation, as a firefighter . . . [who dies while] actually and directly engaged in fighting a fire.") *with id.* at 12013 (including "any individual serving, with or without compensation, a public agency in an official capacity as a law enforce-

ment officer who [at the time of his death had been engaged in apprehension or attempted apprehension of persons connected with a crime, protection of witnesses, prevention of crimes, or performance of potentially dangerous duties]." Thus, this debate fragment is largely irrelevant to the issue of PSOBA coverage for contractor firefighters, and reflects poorly on the thoroughness of the BJA's analysis of PSOBA's legislative history.

Second, there is a marginally better House debate fragment which the BJA overlooked in its analysis. Representative Myers again engaged Representative Eilberg in a discussion of the meaning of PSOBA's proposed statutory terms, this time for the firefighter bill and to clarify the words "any individual serving, with or without compensation, as a firefighter . . . [who dies while] actually and directly engaged in fighting a fire." These are the most relevant snippets of a series of hypothetical situations discussed:

> Rep. Myers: "Could the chairman tell me if people who are involved in preparation of fire equipment who are not members of a fire organization, but are hired by that organization, and were to be killed, would they be covered?"
>
> Rep. Eilberg: "I would say 'no.'"
>
> Rep. Myers: "Would the gentleman also respond to the possibility of a good samaritan activity, a volunteer who is not on the roll of a volunteer organization"?
>
> Rep. Eilberg: "He would not be covered."
>
> . . . .

> Rep. Myers: "What specifically would constitute membership in a firefighting organization"?
>
> Rep. Eilberg: "The bill defines fireman to include a volunteer of a legally organized volunteer fire department, and such firemen are covered when they are actually and directly engaged in fighting fires."
>
> . . . .
>
> Rep. Myers: "What about the man who is not a member of a firefighting organization? Is he covered?"
>
> Rep. Eilberg: "No."

122 Cong. Rec. 12002, 12022-23 (1976).

We learn, at most, [12] from this colloquy that the House bill does not cover preparers of fire equipment, that in the House bill membership in a fire department includes volunteers (although we do not learn who is not a member), and that in the House bill non-members of fire departments are not covered. The court notes, however, that it is the Senate version of firefighter coverage that is adopted by both houses of Congress and becomes law, not the House version. To the court's knowledge, there is absolutely no debate in the Senate on the topic of the scope of the term "serving a public agency in an official capacity." Because the House acquiesced to Senate language defining the scope of coverage for firefighters, H.R. Rep. No. 94-1501, at 5 (1976), the debate in the House clarifying statutory terms that were never enacted as law carries little to no weight in determining the legislative intent of Congress.

The court has reviewed the extensive legislative history of PSOBA and recognizes therein an impulse to remedy a situation where the survivors of law enforcement personnel and firefighters who have perished in the line of duty are left with financial struggles. This is an expansive and generous impulse, not a cramped and miserly one. The BJA has incorrectly read a tiny fragment of the floor debates of the House to overrule that effort. Laws providing for financial compensation in cases of injury and death are remedial in nature, and must be liberally construed to achieve their purpose and "to avoid incongruous or harsh results." *Baltimore & Philadelphia Steamboat Co. v. Norton, 284 U.S. 408, 414, 52 S. Ct. 187, 76 L. Ed. 366 (1932)* (stating that such laws "are deemed to be in the public interest and should be construed liberally in furtherance of the purpose for which they were enacted and, if possible, so as to avoid incongruous or harsh results") (citation omitted); *see also Voris v. Eikel, 346 U.S. 328, 333, 74 S. Ct. 88, 98 L. Ed. 5 (1953)* (citing *Baltimore & Philadelphia Steamboat); Lykes Bros. S.S. Co. v. United States, 513 F.2d 1342, 1353, 206 Ct. Cl. 354 (Ct. Cl. 1975)* ("It is generally recognized that remedial legislation should be construed liberally in order to effectuate its purpose.") (citations omitted); *White v. United States, 102 F. Supp. 585, 586, 122 Ct. Cl. 31 (Ct. Cl. 1952)* (stating that "remedial legislation [is] to be liberally construed") (citations omitted). Under *Skidmore* deference, the BJA's categorical denial of PSOBA coverage for contractor firefighters cannot be upheld, because its reasoning is not thorough, not logical and not persuasive, especially in light of the stated remedial purpose of PSOBA.

The court has also reviewed subsequent amendments to PSOBA, to see if these amendments indicate a

general narrowing of the scope of coverage for public safety officers. [13] There is none; in fact, Congress has repeatedly broadened coverage for public safety officers. For example, in 1986 personnel serving on rescue squads and ambulance crews were added, in 2000 FEMA employees and local emergency management and civil defense officials were added, and in 2002 chaplains were added, all now covered by PSOBA if certain conditions are met. *See 42 U.S.C.A. § 3796b* Notes (West 2003). Congress also acted in 2003 to broaden the coverage for public safety officer[s] who die of heart attacks or other occupational illnesses while on duty or shortly thereafter. *See* 149 Cong. Rec. S2840, S2855 (2003) (statement of Sen. Leahy). Senator Leahy, one of the sponsors of the Hometown Heroes Survivors Benefits Act of 2003, now codified at *42 U.S.C. § 3796(k)*, described the goal of that legislation:

> When establishing the PSOB Program, Congress placed only three limitations on the payment of benefits. No award could be paid, first, if the death was caused by the intentional misconduct of the officer or by such officer's intention to bring about his own death; second, if voluntary intoxication of the officer was the proximate cause of such officer's death; or, third, to any person otherwise entitled to a benefit if such person's action was a substantial contributing factor to the death of the officer.
>
> In years following, however, the Justice Department began to interpret the Program's guidelines to exclude from benefits the survivors of public safety officers who

die of a heart attack or stroke while acting in the line of duty, arguing that the attack must be accompanied by a traumatic injury, such as a wound or other condition of the body caused by external force, including injuries by bullets, smoke inhalation, explosives, sharp instruments, blunt objects or other physical blows, chemicals, electricity, climatic conditions, infectious diseases, radiation, and bacteria. Barred are those who suffer from occupational injuries, such as stress and strain.

Service-connected heart, lung, and hypertension conditions are silent killers of public safety officers nationwide. The numerous hidden health dangers dealt with by police officers, firefighters and emergency medical personnel are widely recognized, but officers face these dangers in order to carry out their sworn duty to serve and protect their fellow citizens.

Our multi-partisan bill would effectively erase any distinction between traumatic and occupational injuries. The Hometown Heroes bill will fix the loophole in the PSOB Program to ensure that the survivors of public safety officers who die of heart attacks or strokes in the line of duty or within 24 hours of a triggering effect while on duty regardless of whether a traumatic injury is present at the time of the heart attack or stroke are eligible to receive financial assistance.

> I was serving my first term in the Senate when this program was established, and I firmly believe that this is what Congress meant for the survivors of our Nation's first responders to receive through the Public Safety Officers Benefits Program.

Id. When Congress wanted to add an exclusion to the limited number of exclusions from PSOBA coverage, it knew how to do so, such as in 1984 when grossly negligent behavior was added to the list of death-causing behaviors preventing an award of PSOBA benefits. Pub. L. No. 98-473, Title II, § 609F, 98 Stat. 2099 (1984) (codified as amended at *42 U.S.C. § 3796a(3)*).

Thus, the subsequent amendments of PSOBA show no legislative intent to narrowly define "serving a public agency in an official capacity" as categorically excluding contractor firefighters. The legislative history of PSOBA as a whole indicates that Congress was desirous of compensating the survivors of firefighters killed in the line of duty, and that legislative history does not support the BJA's narrow and cramped reading of PSOBA so as to categorically ban PSOBA coverage for contractor firefighters. Therefore, the court does not find the ban on PSOBA coverage to be persuasive under *Skidmore* deference. Even if the BJA's reading of the statute were entitled to *Chevron* deference, the court would find the categorical ban to be unreasonable and impermissible under the more deferential standard, in light of PSOBA's remedial purpose and legislative history.

b. Do PSOBA Awards to the Survivors of Private-Sector Employees after the September 11,

2001 Terrorist Attacks Mean that the Denial of Plaintiffs' PSOBA Claim Was Arbitrary or Capricious?

Plaintiffs argue that because the survivors of some non-governmental employees were awarded PSOBA benefits by the BJA during the aftermath of the September 11, 2001 terrorist attacks, denying PSOBA benefits to Mr. Groff's family is arbitrary. Plaintiffs contend that "Defendant's providing benefits to 9/11 rescue workers confirms that privately-employed individuals are not per se disqualified from coverage as Defendant now maintains and Defendant has arbitrarily excluded Mr. Groff from coverage." Pls.' Mot. at 30. Plaintiffs also argue that "[t]here is no distinguishable circumstance" between the situation of privately-employed emergency medical services personnel who died in New York City during the 9/11 attacks, and the death of Mr. Groff fighting wildfires in California. *Id.* at 29-30.

The court disagrees with plaintiffs' conclusion that the BJA has acted arbitrarily and capriciously in treating terrorism-related deaths differently from deaths unrelated to terrorism. Congress established a new and different process for reviewing applications for PSOBA benefits for the survivors of rescue workers who perish in terrorism-related disasters, as discussed *infra*. The BJA evidently believed it was following two different congressional mandates for the two types of claims. Creating two disparate schemes of claims review, which produce harsh results for those not favored by Congress' attention to terrorism, is not arbitrary, in itself. The court's fundamental concern with the BJA's denial of the PSOBA claims of plaintiffs is one of substantial

compliance with PSOBA and the "similar relationship" and "official recognition" tests that define "serving a public agency in an official capacity." Before turning to that dispositive issue, the court addresses plaintiffs' argument concerning the disparate treatment of Mr. Groff and the private sector employees who died in the 9/11 disaster.

The loss of life and the chaotic aftermath of the terrorist attacks in New York City on September 11, 2001 were unique circumstances. *See* AR at 636 (BJA claim determination) (estimating that "approximately four hundred emergency personnel were killed during rescue attempts" related to the collapse of the World Trade Center towers in New York City). Congress acted quickly to change the process by which the BJA would review PSOBA claims related to the attacks. Within a week of September 11, 2001, an expedited PSOBA benefits process was established by law for public safety officers who died during rescue attempts related to the September 11, 2001 attacks. *See* Expedited Payment for Heroic Public Safety Officers, Pub. L. No. 107-37, 115 Stat. 219 (2001). As a result, the BJA had only thirty days after receipt of "certification by a public agency that a public safety officer employed by such agency was killed or suffered a catastrophic injury as a direct and proximate result of a personal injury sustained in the line of duty . . . in connection with the rescue or recovery efforts related to the terrorist attacks of September 11, 2001" to issue payment to the survivors of the public safety officer. *Id.*

When answering inquiries from a trade association of ambulance companies on October 1, 2001, the BJA explained that PSOBA benefits had been extended to cover private rescue workers "[d]ue to the circum-

stances and scope of the tragic events in question." AR at 695. The survivors of these workers could apply "through the Fire Department of New York (FDNY) or appropriate local government agency provided that the agency certifies that the individuals were acting in an official capacity under the supervision of that agency." *Id.* Thus, the BJA apparently understood the intent of Congress, in its passage of the Expedited Payment for Heroic Public Safety Officers Act, to unreservedly include privately employed rescue workers in the definition of public safety officers, if these workers had been swept up in the response to the 9/11 attacks and a public agency certified that their service was in an official capacity. Moreover, the BJA read the statutory requirement of a payment within thirty days after receipt of the certification from a public agency to mean that the certification, in these circumstances, replaced the role of the BJA as the arbiter of whether that decedent qualified as a public safety officer who died in the line of duty. That interpretation of the Expedited Payment for Heroic Public Safety Officers Act is not obviously unreasonable, because the Act does indeed appear to circumvent any need for deliberation by the BJA as to PSOBA eligibility, as far as the 9/11 attacks were concerned.

With the passage of the USA Patriot Act, Congress expanded the use of expedited processing of PSOBA awards to deaths "in connection with prevention, investigation, rescue or recovery efforts related to a terrorist attack." *See* USA Patriot Act, Pub. L. No. 107-56, §§ 611-12, 115 Stat. 369 (2001) (codified at *42 U.S.C. § 3796c-1*). The USA Patriot Act version of the expedited processing of PSOBA benefits in deaths related to terrorist attacks retains the requirement of payment

within thirty days of the public agency's certification of the death. *Id.* As a result, the BJA, for a variety of claimants in the aftermath of the 9/11 attacks, accepted public agency certifications of public safety officer deaths in the line of duty as *prima facie* evidence of PSOBA eligibility in those terrorist attack situations. AR at 903.

It may be that the BJA interpretation of the interaction between the expedited payment provision of the USA Patriot Act and the BJA's duty under PSOBA to determine who is eligible for PSOBA benefits is somehow flawed. That issue is not before the court, because plaintiffs here do not challenge the BJA's PSOBA awards to the survivors of privately employed rescue workers who died in the 9/11 attacks. Rather, they argue that the denial of PSOBA benefits to Mr. Groff's survivors is arbitrary and capricious in light of the earlier PSOBA awards to non-government employees in the 9/11 situation. The disparity might be unfair in a moral sense, but the BJA review processes have not been shown to be arbitrary or capricious.

An executive branch action which conforms to statutory imperatives is not arbitrary or capricious. Plaintiffs characterize the different treatment of Mr. Groff and the 9/11 decedents as "utterly hypocritical" and impossible to "rationalize." Pls.' Mot. at 29. Yet, the BJA "similar relationship" and "official recognition" tests for public safety officer deaths unrelated to terrorism are not unreasonable. *Chacon, 48 F.3d at 512.* The expedited processing of PSOBA claims for terrorism-related deaths also appears to be a reasonable expression of the USA Patriot Act. Thus, the difference in the BJA treatment of plaintiffs here and of the survivors of the 9/11 rescue workers is not arbitrary or ca-

pricious, although it may be logically inconsistent or even morally unjustifiable.

The court has a "'duty . . . to observe the conditions defined by Congress for charging the public treasury.'" *Schweiker v. Hansen, 450 U.S. 785, 788, 101 S. Ct. 1468, 67 L. Ed. 2d 685 (1981)* (quoting *Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 385, 68 S. Ct. 1, 92 L. Ed. 10 (1947))*. It cannot order the BJA to extend expedited processing of PSOBA claims beyond the limits that Congress has set. The court does note, however, that the authorization of expedited processing of PSOBA claims for the survivors of privately-employed public safety officers in terrorism attacks, and the PSOBA awards made to the families of private-sector employees by the BJA under the mandate of the USA Patriot Act, provide a concrete example of Congress treating private sector and public sector employees as indistinguishable in the context of PSOBA awards. This is further evidence that the BJA has misread the remedial spirit of PSOBA in narrowly interpreting the scope of "serving a public agency in an official capacity."

3. Does Mr. Groff's Provision of Services to the CDF Meet the "Similar Relationship" and "Official Recognition" Tests?

a. Similar Relationship

The record presents an abundance of evidence concerning Mr. Groff's employment as an airtanker pilot. Defendant highlights the employer-employee relationship between SJH and Mr. Groff, and cites documents which establish that relationship in matters such as wages, benefits, workplace policies regarding alcohol

consumption and sexual harassment, and disciplinary procedures. *See* AR at 719, 725, 729-30, 733-34, 825; Def.'s Facts PP 1-10; Def.'s Add'l Facts PP 2-11. This evidence is largely undisputed and shows that Mr. Groff was the employee of a contractor for the CDF, not a CDF employee. Defendant's cited evidence, however, does not describe the nature of Mr. Groff's work. Because the "similar relationship" test requires a review of the performance of Mr. Groff's services, the court must turn to the portion of the record that is cited by plaintiffs.

Plaintiffs cite two types of evidence which go to the issue of whether Mr. Groff was much like a CDF employee, in a "similar relationship of performing services as a part of a public agency." The first type of evidence is the procedures handbook for pilots fighting fires for the CDF. [14] AR at 285-635. Having reviewed this pilot handbook, the court finds that Mr. Groff was fully integrated into the firefighting services of the CDF.

During firefighting operations, contractor pilots such as Mr. Groff were supervised by a CDF air tactical group supervisor who would "ordinarily fly in an orbit above the level of the airtankers and . . . describe targets to the airtanker and helicopter pilots." [15] AR at 404. The CDF dispatched the planes flown by pilots such as Mr. Groff, *id.* at 372, and specified what uniforms those pilots would wear, *id.* at 352. Contractor pilots were required to participate in CDF debriefings (critiques of missions), *id.* at 381, and were evaluated by CDF personnel, *id.* at 381-82. Contractor pilots had CDF credit cards for refueling CDF planes. *Id.* at 385. Mr. Groff, from the evidence provided in the CDF aviation handbook, was functioning as a part of the CDF as he was

performing firefighting services, much like a CDF employee.

Plaintiffs' second type of evidence is found in two letters from a CDF official describing the nature of Mr. Groff's services and his relationship to the CDF. AR at 34, 247-48. The first letter, written on September 3, 2002, lists various aspects of Mr. Groff's firefighting services, and was composed by W. David Wardall, the CDF Deputy Chief of Aircraft Maintenance and Engineering. *Id.* at 247-48. The second letter was written a few days later by Mr. Wardall, *id.* at 34; both letters were submitted to the BJA to explain Mr. Groff's role within the CDF.

The court reproduces Mr. Wardall's first letter, almost in its entirety, because it is highly relevant to the "similar relationship" test:

> Mr. Eric Martin [of the BJA] called me last [sic] and advised that your Department has received the line of - duty death claim package for one of our pilots, Captain Larry Groff. Eric asked if Captain Groff was an employee of CDF or San Joaquin Helicopters. The Coroners Death Certificate listed San Joaquin Helicopters as the employer. This is a true statement. The employer, San Joaquin Helicopters was merely a conduit to provide pay to our pilot. However, Captain Groff, was in our opinion, serving as an officially recognized and designated member of the California Department of Forestry and Fire Protection.

The State of California has submitted the PSOB death benefit application for Captain Groff because Larry Groff was the Pilot-in-Command of a State Airtanker responding to a State wildland fire. The following facts support our claim that Captain Groff was in fact "officially recognized and a designated member of the California Department of Forestry and Fire Protection and a State firefighter":

1. Larry Groff was an interagency "carded" Airtanker Pilot. This designation authorized and required Larry Groff to operate a State fire fighting airtanker as Pilot-in-Command. Larry had the authority, duty and obligation to respond to wildland fires and to take immediate and independent action to suppress and combat wildfires.

2. The State of California and the US Government were the beneficiaries from the fire fighting flight operations.

3. Larry Groff operated a State airtanker for the State of California on State fires and mutual aid responses to Federal Agency fires.

4. Larry Groff operated a State owned airtanker at the di-

rection of CDF dispatchers and airborne air attack officers in command and control aircraft.

5. Larry Groff slept at State airtanker bases with other State firefighters, ate State furnished meals and wore a State supplied flight suit and helmet.

6. Larry was the final authority and responsible for the safe operation of the State Airtanker.

7. Larry had the authority as a State firefighter pilot under the Federal Aviation Regulations to close airspace to civil aircraft, to get priority handling from the FAA on airspace use, and to give orders as necessary to suppress wildland fires.

. . . .

The State of California is submitting the above information for the wife and children of Airtanker Pilot Lawrence L. Groff, SSN [].

I certify under the penalty of perjury that Larry Groff was performing the duties of Pilot-in-Command on a State airtanker, was duly recognized and designated as firefighter pilot by the State of California, Department of Forestry and Fire Protection and was killed in the line-of-duty.

> The State of California hereby requests that the Department of Justice to provide an affirmative determination that Captain Groff's wife and children are entitled to the Federal Firefighter death benefit. Thank you for your consideration and assistance! If you have any questions, please call me.

AR at 247-48. Mr. Wardall's second letter is also relevant and adds further detail:

> The only function of the contractor [SJH] was to provide a means to pay long term (contract) employees. Typically, our pilots and maintenance technicians have 20 to 30 years of service and are retained from contract to contract because of the extensive knowledge and experience.
>
> We also set pilot standards, must approve the hiring of each pilot, train the pilots, check ride and finally card the pilots for State duty. The pilots were and continue to operate aircraft with the full authority of a State firefighter pilot. The sole function of the contractor was/is to provide a means of paying the pilots and maintenance technicians.

Id. at 34. These letters written by Mr. Wardall show that Mr. Groff was fully integrated into the CDF and was performing services as a part of the CDF much like a CDF employee.

Fact findings by the public agency whose public safety officer has died are entitled to substantial weight

as the BJA reviews a PSOBA claim. *Demutiis v. United States, 291 F.3d 1373, 1379 (Fed. Cir. 2002)*(citing *28 C.F.R. § 32.5 (2001)*). On the other hand, legal conclusions made by the public agency whose public safety officer has died are not entitled to the same deference by the BJA when those conclusions concern the PSOBA eligibility of the decedent's survivors. *See id.* ("The [BJA] regulation . . . requires the [BJA] to give substantial weight only to 'the evidence and findings of fact presented by . . . administrative and investigative agencies,' not to their legal conclusions.") (quoting *28 C.F.R. § 32.5*). The determination of who is, and who is not, a public safety officer is vested in the BJA, at least for deaths not related to terrorism. *See 42 U.S.C. § 3796(a)* ("In any case in which the Bureau of Justice Assistance . . . determines, under regulations issued pursuant to this subchapter, that a public safety officer has died as the direct and proximate result of a personal injury sustained in the line of duty, the Bureau shall pay a benefit . . . ."); *id. § 3796c(b)* ("Responsibility for making final determinations shall rest with the Bureau."); *see also supra* Section III.C.2.b of this opinion discussing amendments to PSOBA since September 11, 2001. When the CDF described the work performed by Mr. Groff and his relationship with the CDF, these are fact findings by the CDF that should have been accorded substantial weight by the BJA in its PSOBA claim review.

Here, it does not appear that the BJA gave substantial weight to Mr. Wardall's evidence of Mr. Groff's relationship with the CDF. Rather, the BJA did not look beyond the SJH contract with the CDF and Mr. Groff's personnel records with SJH. Although Mr. Wardall described SJH as a pay conduit, with the payment of pi-

lots and technicians being its sole function as a contractor, the BJA disagreed and concluded that because Mr. Groff was an SJH employee he could not have functioned as a part of the CDF. This analysis does not give Mr. Wardall's facts any weight, and appears to avoid inquiring into the nature of Mr. Groff's provision of services to the CDF. The BJA has either failed to comply with its own test for determining if a non-employee is nonetheless in a "similar relationship" to a public agency, or has given insufficient weight to the only relevant facts in the record concerning the day-to-day services provided to the CDF by contractor pilots such as Mr. Groff.

The BJA was required to give substantial weight, *see Demutiis, 291 F.3d at 1379*, to all of Mr. Wardall's factual statements concerning Mr. Groff's duties, working conditions, supervision, and "authority as a State firefighter pilot," AR at 247. While the BJA conceded that "CDFFP directed Mr. Groff in the performance of his duties," *id.* at 899, it nonetheless concluded that plaintiffs "have not shown that Mr. Groff was a public safety officer serving a public agency in an official capacity," *id.* at 902. The court has arrived at a wholly contrary conclusion after an analysis of the dispositive facts in this matter and has determined that the record demonstrates that Mr. Groff is a clear example of a non-employee who nonetheless is similarly providing services as a part of public agency, much like a public employee.

The BJA relies not on Mr. Wardall's detailed fact findings that Mr. Groff provided services as a part of the CDF, but on the boilerplate paperwork memorializing Mr. Groff's relationship with SJH. The BJA found that SJH had "a clearly superior right of control as his

employer, *i.e.*, the company could remove Mr. Groff from his assignment to the CDFFP at any time and could otherwise direct the performance of his duties other than when he was flying on a CDFFP mission." AR at 899-900. This analysis is flawed. Properly giving Mr. Wardall's statements substantial weight, it is evident that the CDF controlled the hiring, training, licensing, and equipping of Mr. Groff, and well as the supervision, task assignments and evaluation of Mr. Groff. Mr. Groff's signature on a variety of SJH personnel forms offers insufficient evidence that SJH had a superior right of control over Mr. Groff's performance of firefighting services, the crucial test at issue here. And although SJH paid Mr. Groff's wages and had the right to remove him from his position, it appears that the CDF had a similar influence over these matters. [16]

The BJA also relied on the SJH-CDF contract provisions relieving the CDF from liability if injuries were caused by Mr. Groff's performance of services, and asserting that SJH employees act in an independent capacity. AR at 899. While this boilerplate language might be pivotal in a tort claims action, this does not overcome Mr. Wardall's evidence, due substantial weight, that Mr. Groff functioned within the CDF, providing services much like a CDF employee. Mr. Groff's legal relationship with SJH as his employer did not preclude his having had, at the same time, a functional relationship with the CDF. To find otherwise is to blindly apply a categorical ban on contractor employees being covered by PSOBA, a ban unsupported by the legislative history of the statute, and to avoid examining Mr. Groff's services under the "similar relationship" test.

The court finds that Mr. Groff was performing services as a part of the CDF, and that his service meets

the "similar relationship" test for "serving a public agency in an official capacity."

b. Official Recognition

Plaintiffs point to ample evidence of official recognition by the CDF of Mr. Groff's services, in support of their contention that he was "officially recognized or designated as functionally within or a part of the public agency." Some of this recognition implies that Mr. Groff was functionally part of the CDF. For example, Mr. Wardall refers to Mr. Groff as "one of our pilots." AR at 247. Mr. Wardall also refers to Mr. Groff as a "State firefighter pilot." *Id.* But the CDF also directly addressed the issue of official recognition and Mr. Groff's role within the CDF:

> Captain Groff was, in our opinion, serving as an officially recognized and designated member of the California Department of Forestry and Fire Protection. . . . The following facts support our claim that Captain Groff was in fact "officially recognized and a designated member of the California Department of Forestry and Fire Protection and a State firefighter":
>
> > 1. Larry Groff was an interagency "carded" Airtanker Pilot. This designation authorized and required Larry Groff to operate a State fire fighting airtanker as Pilot-in-Command. Larry had the authority, duty and obliga-

> tion to respond to wildland fires and to take immediate and independent action to suppress and combat wildfires.
>
> . . . .
>
> 8. Governor Gray Davis issued a Statewide proclamation designating Larry Groff as a firefighter and a hero. Gray Davis is the current Governor, State of California.
>
> 9. Larry Groff's name has been added to the State firefighter's memorial located in the State Capitol.
>
> 10. Larry Groff's name has been added to the national firefighter's memorial in Maryland.

Id. at 247-48. The court agrees with plaintiffs that Mr. Groff was officially recognized as being functionally within the CDF.

The BJA apparently chose to disregard the CDF's official recognition that Mr. Groff was a functional part of the CDF. In the Final Agency Determination, the BJA Director states that "all claimant proffered were CDFFP assertions of 'official recognition of public safety officer status' which were made after Mr. Groff's death and, at times, specifically for the well-intentioned, but mis-guided purpose of assisting the claimant in qualifying for the PSOB Federal benefit." *Id.* at 902. It is not perfectly clear from the record why the BJA felt Mr. Wardall's official recognition was in-

sufficient under the "official recognition" test, but at least part of the BJA's reasoning appears to be based on an inappropriate adverse inference.

The BJA's rejection of Mr. Wardall's official recognition of Mr. Groff's role within the CDF, as expressed in the Final Agency Determination, contains a footnote. That footnote states that the BJA was entitled to draw an adverse inference because plaintiffs did not produce any personnel files on Mr. Groff kept by the CDF. AR at 902 n.30. This adverse inference is not justified.

When the Director of the BJA conducted his review of the denial of PSOBA awards to plaintiffs, he noted "two items that are not included in agency files which I believe would better inform my review and final agency decision." *Id.* at 702A. The first was an executed copy of the SJH-CDF contract. *Id.* The second item was "personnel documentation, including but not limited to any waivers of rights and death and/or disability benefit documentation, that was specific to Mr. Groff and that was maintained by San Joaquin Helicopters and, possibly, the California Department of Forestry and Fire Protection." *Id.* The BJA Director "ask[ed] that [Mr. Poretti, plaintiffs' counsel] provide [Mr. Herraiz, the BJA Director] with access to this documentation." *Id.*

Plaintiffs' counsel contacted SJH, enclosing a copy of Mr. Herraiz' letter, requesting Mr. Groff's personnel files and the contract with CDF. *Id.* at 703. SJH apparently refused to provide the documentation requested, absent a subpoena. *Id.* at 704. Mr. Poretti wrote Mr. Herraiz, explaining his difficulty obtaining the requested documents, expressing his willingness to cooperate with the BJA and stating that he was "open to discussing this matter further with you." *Id.*

The BJA subpoenaed the requested documents from SJH. *Id.* at 705. Once the BJA received the SJH-CDF contract and Mr. Groff's SJH personnel file, the BJA forwarded a copy to Mr. Poretti and mentioned that the record was still open "for the transmittal and review of these additional documents, the submission of additional documentation responsive to prior agency requests, as well as the submission of additional arguments, if any." *Id.* at 706. When the BJA notified Mr. Poretti that the comment period would be closed a month earlier than originally scheduled, pursuant to Mr. Poretti's request, the BJA noted that the original, longer "comment period . . . was intended to provide your client with ample opportunity to respond to the Director of BJA's prior requests for information, to review recently produced documents received from [SJH] and to comment on the record." *Id.* at 889A.

There is no indication in the administrative record of this case that Mr. Herraiz specifically demanded personnel documentation from the CDF that plaintiffs failed to provide. At most, Mr. Herraiz at one point informed plaintiffs that he might "possibly" require access to CDF personnel documentation concerning Mr. Groff. *Id.* at 702A. This vague allusion did not provide notice to plaintiffs that the BJA required these documents for Mr. Herraiz' review. Surely, after Mr. Poretti had pointed out his lack of subpoena power and the BJA had finally obtained, via subpoena to SJH, the SJH records Mr. Herraiz had specifically requested from Mr. Poretti, the BJA could have sent plaintiffs a clear request for CDF documentation if those documents were indeed of interest to Mr. Herraiz. Instead, the BJA continued to make vague allusions to "prior requests" from Mr. Herraiz without specifying that CDF personnel

documentation, potentially identified in Mr. Herraiz' initial communication, was now definitely required by Mr. Herraiz.

Absent a specific and clear request from the BJA for access to CDF personnel files concerning Mr. Groff, the BJA is not entitled to draw an adverse inference from plaintiffs' failure to produce those documents and/or authorize access to them. *See 28 C.F.R. § 32.21(b) (2002)* ("Whenever a claimant for any benefit or fee under the Act and this part has submitted no evidence or insufficient evidence of any material issue or fact, the Bureau shall inform the claimant what evidence is necessary for a determination as to such issue or fact and shall request the claimant to submit such evidence within a reasonably specified time. The claimant's failure to submit evidence on a material issue or fact *as requested* by the Bureau shall be a basis for determining that the claimant fails to satisfy the conditions required to award a benefit or fee or any part thereof.") (emphasis added). The BJA had several opportunities to unequivocally request of plaintiffs Mr. Groff's personnel documentation at the CDF, or permission to access these documents concerning Mr. Groff, and failed to do so.

After having received the communication from Mr. Poretti concerning the difficulties obtaining documents from SJH, it makes no sense that the BJA would require plaintiffs to get CDF documents for the BJA's review. The BJA could have sought such documents from Mr. Wardall at the CDF, who repeatedly suggested to BJA staff members that they call him if they had questions about plaintiffs' claims. AR at 34, 248. Or, the BJA could have used its subpoena powers, as it had with SJH. Pursuant to *28 C.F.R. § 32.5 (2002)*, the BJA "will

request additional assistance or conduct its own investigation when it believes that the existing evidence [provided by the public agency] does not provide the Bureau with a rational basis for a decision on a material element of eligibility." *Id.* Because the BJA never made a clear request for CDF records from plaintiffs, the BJA is not entitled to draw an adverse inference from plaintiffs' entirely adequate response to the documentation requests clearly expressed by the BJA Director.

In view of the specific information that the CDF had already provided the BJA concerning Mr. Groff's status at the CDF, it is unclear whether "personnel" documents which might have been maintained by the CDF on a contractor employee such as Mr.Groff would have been helpful in deciding plaintiffs' PSOBA claim. The evidence available to the BJA was sufficient to have determined the employment status of Mr. Groff, his functional role within the CDF and his official recognition by the CDF. An adverse inference against a PSOBA claimant is only appropriate where "no evidence or insufficient evidence" has been submitted. *28 C.F.R. § 32.21(b).*

The CDF official, Mr. Wardall, quite specifically recognized that Mr. Groff was, in effect, a member of the CDF. AR at 247. In another mailing to the BJA, Mr. Wardall took the trouble to "certify that I am a State Officer." *Id.* at 21. The BJA's refusal to accept this official recognition that Mr. Groff was functionally within the CDF finds no support in the representations proffered by the CDF and is unwarranted. [17] The court finds that Mr. Groff was officially recognized and designated as being functionally within or a part of the CDF, and that his service meets the "official recognition" test established by the BJA.

CONCLUSION

Because the BJA failed to correctly apply its tests for "serving a public agency in an official capacity" in conformance with *42 U.S.C. § 3796b(9)(A)*, failed to give substantial weight to the fact findings of the CDF as required by *28 C.F.R. § 32.5* and incorrectly drew an adverse inference regarding the sufficiency of "official recognition" evidence provided by the CDF in contravention of *28 C.F.R. § 32.21(b)*, the court finds that the BJA did not substantially comply with PSOBA and PSOBA's implementing regulations when denying plaintiffs PSOBA benefits. Having determined that Mr. Groff's service met the similar relationship test for serving a public agency in an official capacity and likewise, having determined that Mr. Groff was officially recognized by the CDF, the court need go no further.

Accordingly, it is hereby **ORDERED** that

(1 Defendant's Motion for Judgment Upon the Administrative Record, filed December 18, 2005, is **DENIED**;

(2 Plaintiffs' Cross Motion for Judgment on the Administrative Record, filed on February 7, 2006, is **GRANTED**;

(3 The Clerk is directed to **ENTER** judgment for plaintiffs in the amount of $ 250,000.00, adjusted in accordance with *42 U.S.C. § 3796(h)-(i)*, paid as directed by *42 U.S.C. § 3796(a)*, in addition to any other benefits due plaintiffs under *42 U.S.C. §§ 3796-3796d-7*, in accordance with this opinion; and

(4 Each party shall bear its own costs.

s/ Lynn J. Bush

Judge

Footnote

1 The facts recited here are undisputed, unless otherwise indicated.

2 This rule was recently rewritten and renumbered. The parties briefed their motions pursuant to the old rule, *RCFC 56.1*. The standard of review for motions on the administrative record remains unchanged.

3 The award amount of $ 250,000 is corrected upward for inflation each year. *42 U.S.C. § 3796(h)-(i)*.

4 In 2005, the BJA proposed extensive revisions of PSOBA regulations, including for the first time a definition of serving a public agency in an official capacity. *Department of Justice, Office of Justice Programs, Public Safety Officers' Benefits Program, 70 Fed. Reg. 43078* (proposed July 26, 2005) (to be codified at 28 C.F.R. Part 32). This notice explains that "[s]ome confusion has arisen over the years as to whether employees or volunteers who serve independent contractors or non-public entities that are working for public agencies are 'serving a public agency in an official capacity' or are 'employees' within the meaning of the PSOB Act, or whether those independent contractors or non-public entities are 'instrumentalities' of public agencies within the meaning of the Act." *Id. at 43081*. The notice also states that "[i]n an effort to assist claimants, pursuant to *42 U.S.C. [§] 3796(a)* and *(b)*, and *[§] 3796c(a)*, the

proposed rule sets out key definitions to clarify these terms within the four corners of the regulation." *Id.*

5 *Chacon* was decided in 1995, before the United States Supreme Court decisions in *Christensen v. Harris County, 529 U.S. 576, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000)*, and *United States v. Mead Corp., 533 U.S. 218, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001)*, clarified the circumstances in which *Chevron* deference should be given to the administrative implementation of a statute. *See Barnhart v. Walton, 535 U.S. 212, 222, 122 S. Ct. 1265, 152 L. Ed. 2d 330 (2002)* (explaining that *Chevron* deference is governed by the rule provided in *Christensen*, as further refined by *Mead*). Although the Federal Circuit might not today accord *Chevron* deference to the BJA policy letter's two-sentence interpretation of "serving a public agency in an official capacity" under the *Mead* standard, this court is bound by precedent of the Federal Circuit unless that precedent is expressly overruled by a subsequent Supreme Court decision. *See Strickland v. United States, 423 F.3d 1335, 1338 n.3 (Fed. Cir. 2005)* (stating the exceptions which allow the Court of Federal Claims to depart from the binding precedent of the Federal Circuit) (citing *Bankers Trust N.Y. Corp. v. United States, 225 F.3d 1368, 1372 (Fed. Cir. 2000)*). Because *Mead* does not compel a different level of deference for the quoted two sentences of the 1981 BJA policy letter than that given by the *Chacon* court, this court must give that interpretation the same level of deference as it was given in *Chacon*.

6 *Letnes* does not, however, provide a strongly analogous situation to this case because *Letnes* involved a

pilot flying a contractor-owned plane, *820 F.2d at 1517-18*, whereas Mr. Groff piloted a CDF plane.

7 That decision was upheld by the United States Court of Appeals for the Ninth Circuit in an unpublished, non-precedential two-page decision. *Holstine v. Dep't of Justice Law Enforcement Assistance Admin., 688 F.2d 846 (9th Cir. 1982), (table).* The Ninth Circuit subsequently decided that it does not have jurisdiction over appeals of the denial of PSOBA benefits. *Davis v. United States, 169 F.3d 1196, 1197 (9th Cir. 1999)* ("Accordingly, we now join other circuits in concluding that the courts of appeals lack jurisdiction to review decisions under the PSOBA but that the Court of Federal Claims does have jurisdiction.").

8 Mr. Holstine was accompanied in the plane and directed by a CDF employee at the time of his death. AR at 139. Mr. Groff was flying solo. *Id.* at 23, 27. There are other factual differences; for example, different contractors employed Mr. Holstine and Mr. Groff. AR at 139, 719.

9 The court will address changes to PSOBA that are relevant to plaintiffs' claim *infra*.

10 *See supra* note 5.

11 The rejection of the Holstine claim also depended on a fact-specific analysis of Mr. Holstine's services under the "similar relationship" and "official recognition" tests. AR at 137-38. Those tests, as discussed *supra*, are entitled to *Chevron* deference. Whether or not those tests were properly applied in the Holstine claim rejection is not a question before the court. Defendant and

the BJA also derive some support from dicta in *Chacon v. United States, 32 Fed. Cl. 684 (1995), aff'd, 48 F.3d 508 (Fed. Cir. 1995)*, stating that "one who works for a government contractor does not thereby acquire the requisite relationship to the contracting agency." *Id. at 688* (citing the 1981 BJA policy letter). Decedents in that case were not working for government contractors; the court declines to follow dicta which is not binding precedent.

12 The tactic of interrogating the sponsor of a bill to narrow the meaning of the proposed legislative terms, for the announced purpose of establishing "some legislative history," 122 Cong. Rec. 12002, 12022 (1976), has been criticized because it creates deceptive "'planted' legislative history" and does not reveal true congressional intent. *Harold v. United States, 634 F.2d 547, 553, 225 Ct. Cl. 168 (Ct. Cl. 1980)* (Nichols, J., concurring). Judge Nichols commented that planted history is "an attempt to insert statutory language neither House has voted on, nor has the language gone before the President for his signature or veto." *Id.* Judge Nichols cautioned that "[w]hatever else a planted history may de facto achieve, it should not be allowed to hoodwink simple characters out in the boondocks who still suppose they can ascertain what Congress intends by procuring and reading the statutes." *Id. at 554*. Although not quite so dismissive as Judge Nichols, the Court of Claims in *Harold* discounted a colloquy in PSOBA's legislative history involving Representative Eilberg, similar to the one at issue here, by quoting Justice Frankfurter: "'A loose statement even by a chairman of a committee, made impromptu in the heat of debate, less informing in cold type than when heard on the floor,

will hardly be accorded the weight of an encyclical.'" *Id. at 551* (citation omitted).

13 This review is by no means an exhaustive explication of all of the changes to PSOBA since 1976. The court will discuss *infra* in Section III.C.2.b of this opinion another significant change to PSOBA that was passed by Congress in response to the September 11, 2001 terrorist attacks.

14 Defendant complains that the handbook was revised after Mr. Groff's death and asserts that the revised handbook version submitted by plaintiffs to the BJA does not "establish[] . . . the terms and conditions of Mr. Groff's employment when he died on August 27, 2001." Def.'s Counterstatement of Facts P 19. Plaintiffs submitted the 2002 CDF website version of the pilot handbook to the BJA on February 9, 2005. AR at 150, 285-635. Although the BJA contacted plaintiffs after receiving the supporting materials for their appeal to the BJA Director, and requested other documentation necessary for the BJA Director's review, the BJA did not request a copy of the 2001 version of the handbook. AR at 702A. Pursuant to *28 C.F.R. § 32.21(b) (2002)*, the BJA must inform claimants when they have submitted insufficient evidence on a material issue or fact for their PSOBA claim. *Id.* ("Whenever a claimant for any benefit or fee under the Act and this part has submitted no evidence or insufficient evidence of any material issue or fact, the Bureau shall inform the claimant what evidence is necessary for a determination as to such issue or fact and shall request the claimant to submit such evidence within a reasonably specified time."). Because the BJA did not demand an older version of the pilot handbook from plaintiffs, the court ac-

cepts the handbook in the record as acceptable evidence to be accorded some weight. Defendant was asked if "the government ha[s] any reason to believe that the revised handbook changed in any significant fashion the matters specifically referenced by the Plaintiffs." Oral Argument Transcript (Tr.) at 11. Defendant responded "No." *Id.*

15 On the day of his death, Mr. Groff was performing services under the supervision of a CDF air tactical group supervisor flying above his airtanker. AR at 25.

16 The SJH contract with the CDF specified a minimum hourly wage and a minimum package of benefits, including health, dental and vision care, for the contractor pilots. AR at 825. The amount of wages paid to Mr. Groff in his final months with SJH appears to have been the product of a negotiation process involving the CDF, SJH and the pilots. *See* AR at 766 (SJH-CDF contract amendment 8 dated July 6, 2001) ("This amendment adds money to the agreement for pilots' negotiated raise of 29%. . . . Contractor's original rates were established under the 1995 bid. This amendment replaces rates submitted in amendment 7 to include the State's responsibility of an additional 9% for a total obligation of 17% of the contractor pilot job action negotiated increase of 29% over the 2000 fire season rates."). The CDF also had the power to revoke the flying privileges of pilots such as Mr. Groff. *Id.* at 532.

17 California now mandates that contracts for firefighter pilots shall include a provision which guarantees that the survivors of those pilots killed in the line of duty receive a payment in the amount of a PSOBA death benefit, if the BJA finds them ineligible for

PSOBA benefits, as well as "[a]n amount, to be determined by [the CDF], that would be commensurate with the death benefit payable to a mid-career firefighter employed by the department who died in the line of duty. *Cal. Pub. Res. Code § 4114.5(a)(1)-(2)*. This statutory provision does not help plaintiffs because it was introduced after Mr. Groff's death and the statute cannot be read to apply retroactively to the SJH-CDF contract in place at the time of Mr. Groff's death.

Public Safety Officers' Benefits Act
APPEAL,
On Behalf of
MRS. CHRISTINE WELLS GROFF
PSOB CLAIM No. 02-158
RE: AIR TANKER PILOT LAWRENCE L. GROFF
Hearing Officer: Robert J. Gernignani
February 20, 2004

DETERMINATION MEMORANDUM

I. Introduction

On December 2, 2002, Mrs Christine Wells Groff requested a formal hearing to appeal the adverse determination of the U.S. Department of Justice denying Mrs. Groff benefits under the Public Safety Officers' Benefits (PSOB) Act resulting from the death of her husband, Air Tanker Pilot Lawrence L. Groff. The non-disputed facts of the case are that on August 27, 2001, a vegetation fire was reported burning outside of Hopland, California Several aircraft were dispatched by the California Department of Forestry and Fire Protection to help in suppressing the fire. Lawrence Groff, who was piloting one of the air tankers, collided with a second air tanker in mid-air and both tankers crashed to the ground, killing Lawrence Groff and the other pilot.

Mrs. Christine Groff's claim was certified as ready for a determination on October 17, 2002. Based on the Report of Public Safety Officers' Death submitted by the California Department of Forestry and Fire Protection, the Claim Benefits submitted by Mrs. Groff, and an analysis of the facts of the case. The Bureau of Justice Assistance (BJA) determined that the death of

Airtanker Pilot Lawrence L. Groff is not covered under the PSOB Act (42 USC. Sec. 3796 as amended, and 28 CFR Part 32),. Thus, Lawrence Groff's survivors, his wife and minor child, were determined to be ineligible to receive the benefits authorized to be paid undar the Act. The Claim was officially denied on October 31,2002,

The case was assigned to this Administrative Hearing Officer an March 27, 2003, Mrs. Groff was first contacted by telephone on April 2, 2003, and was again contacted by telephone on May 20, 2003, On each occasion the appeal process was discussed. A follow-up letter was mailed to Mrs. Groff on May 20, 2003. A subsequent letter was sent to Mrs, Groff on November 13, 2003. outlining options for proceeding with the Appeal and asking her to respond in order to establish some timelines, In early December 2003, Mrs. Groff telephoned to report that she had decided to forego a formal hearing and to submit her evidence and arguments by mail, in lieu of a hearing. Mrs. Groff's evidence, arguing her case that she should be deemed eligible for the benefit to be paid under the PSOB Act, was received on January 12, 2004.

II. Focal Issue

Under the Public Safety Officers' Benefits (PSOB) Act and regulations, program benefits are authorized to be paid to the survivors of public safety officers found to have died as the direct and proximate result of a personal injury sustained in the line of duty (42 USC. §3796a and 28 CFR, 32.1), A "public safety officer" is defined as "any individual serving a public agency in an official capacity, with or without compensation as a law enforcement officer, firefighter, rescue squad member or ambulance crew members 42 U.S.C. §3796b(7)

and C.F.R. 32.2(j) A "public agency" is defined as "The United States, any State of the United States or any unit of local government, department, agency, or instrumentality of any of the foregoing" 42 U S.C. §379.6b(b) and CFR. Thus, the death of a privately-employed worker who has been contracted by a public agency is not covered under the PSOB Act.

The focal issue in this case is clear. Was Air Tanker Pilot Lawrence L Groff a public safety officer, as defined under the Act and its Regulations? The Bureau of Justice Assistance (BJA) determined that he was not. The Claimant argues that he was BJA points to the fact that Lawrence Groff's death certificate and other documentation submitted in support of this claim identify him as an employee of San Joaquin Helicopters, a private company. The company contracted to provide the California Department of Forestry with air tanker pilots. Lawrence Groff, a pilot provided by San Joaquin Helicopters, died as a result of a mid-air collision while fighting the fire of August 27, 2001 near Hopland, California.

III. The Claimant's Evidence and Arguments

The Claimant focuses her evidence and arguments on her contention that San Joaquin Helicopters was merely a bookkeeping service for the California Department of Forestry. She states that all other duties relating to "employer" were performed by the State Department of Forestry. The, Claimant offers into evidence a letter dated September 3, 2002, written by David Wardall, Deputy Chief, Aircraft maintenance and Engineering, which states that "the employer, San Joaquin Helicopters was merely a conduit to provide pay to our pilot " Mr. Wardall states that in his opinion,

Lawrence Groff was serving as an officially recognized and designated remember of the California Department of Forestry and Fire Protection. Mr Wardall offers the following facts to support this contention:

1. Lawrence Groff was an interagency "carded" Airtanker Pilot. This designation authorized and required him to operate a State fire fighting airtanker as Pilot-in-Command. He had the authority, duty and obligation to respond to wildland fires and to take immediate and independent action to suppress and combat wildfires.

2. The State of California and the U.S. Government were the beneficiaries from Lawrence Groff's fire fighting operations.

3. Lawrence Groff operated a State airtanker for the State of California on State fires and mutual aid responses to federal agency fires.

4. Lawrence Groff operated a State owned airtanker at the direction of CDF dispatchers and airborne air attack officers in command and control aircraft.

5. Lawrence Groff slept at State airtanker bases with other State firefighters, State furnished meals and wore a State supplied suit and helmet.

6. Lawrence Groff was the final authority and responsible for the safe operation of the State owned airtanker.

7. Lawrence Groff had the authority, as a State firefighter pilot under the Federal Aviation Regulations, to close airspace to civil aircraft, to get priority handling from the Federal Aviation Administration on airspace use, and to give orders as necessary to Suppress wildland fires

8. California Governor Gray Davis issued a

statewide proclamation designating Lawrence Groff as a firefighter and hero

9. Lawrence Groff's name has been added to the state firefighter memorial located in the State Capitol.

10. Lawrence Groff's name has been added to the national firefighter's memorial in Maryland.

The Claimant also offers into evidence her husband's application for employment, titled Pilot Application, California Department of Forestry, an identification card Issued by the State, medical certificates and copies of her husband's pilot's license. The application was submitted to the Aviation Management Unit of the California Department of Forestry The Claimant notes that once approved by CDF, the application was given to San Joaquin Helicopters for processing payments. Thus, she contends, all employer related duties were conducted by CDF, while San Joaquin Helicopters was merely a conduit to provide pay to the pilot. She also submits into evidence the "8300 Aviation Handbook" written by CDF's Aviation Management Unit.. The handbook was written as a procedural guide for all departmental aviation personnel, of which her husband was a member. The claimant also submitted a photograph of her husband in a CDF uniform, which she claims offers further proof that he was a representative of the State. She concludes with the words, "I believe that my husband, Lawrence L. Groff was in every way a representative, agent and or employee with the California Department of Forestry, serving a public agency in an official capacity." She contends that the evidence strongly supports this position.

IV. Findings of Fact

The initial determination to deny benefits was based on an analysis of facts submitted in reports at the time. the claim was filed., As noted earlier, the non-disputed facts are that on August 27, 2001 the California Department of Forestry and Fire Protection dispatched several aircraft to fight a vegetation fire burning outside of Hopland, California. One of the aircraft, an airtanker piloted by Lawrence Groff, collided mid-air with a second airtanker. Mr. Groff and the pilot of the other plane were both pronounced dead of multiple traumatic injuries at the scene., Benefits were denied because Lawrence Groff was a private contract pilot employed by San Joaquin Helicopters. He was not a public safety officer serving a public agency in an official capacity.

The claimant vigorously disputes the government's position, arguing that Lawrence Groff was, in fact, serving a public agency (the California Department of Forestry and Fire Protection) in an official capacity as a fire fighter. She argues that San Joaquin Helicopters was merely a bookkeeping service for the State Department of Forestry. The Claimant offers evidence to show that while San Joaquin Helicopters provided payroll services for its pilots, all other administrative, training, and supervisory responsibilities were conducted by the state agency which her husband served. The Claimant argues that for all intents and purposes, Lawrence Groff was a firefighter for the California Department of Forestry and Fire Protection.

The over-riding fact, as to whether Lawrence Groff can be considered as having been a public safety officer serving public agency can be found in the contract between San Joaquin Helicopters and the State of California. The contract represents the final agreement of the parties and sets forth the terms and conditions

by which the contractor is to operate. A key clause in the contract states:

"The Contractor, and the agents and employees of the Contractor, in the performance of this agreement, shall act in an independent capacity and not as officers or employees or agents of the State of California."

Clearly, the contract provides that the contract pilots are not to be viewed in any way as having an employee/agency relationship with the California Department of Forestry and Fire Protection.

V. Findings of Law

The U.S. Department of Justice determined that Airtanker Pilot Lawrence Groff was not a public safety officer serving a public agency in an official capacity, defined under the PSOB Act and Regulations. A "public safety officer" as defined as "any individual serving a public agency in an official capacity, with or without compensation, as a law enforcement officer, firefighter, rescue squad member or ambulance crew member" (42 U.S.C. 3796b(7)a and 28 C. F R32.2(j)). A "public agency" is defined as the "United States, any State of the United States.., or any unit of local government, department, agency, or instrumentality of any of the foregoing" (42 U.S.C.3796b(6) and C.F.R32.2(k)).

Lawrence Groff was not serving a public agency in an "official capacity" as required by law. As noted above in order to be serving a public agency in an official capacity one Must be an officer, employee, volunteer, or hold an other position with the State agency. Rather, Lawrence Groff was serving as an employee of a private employer (San Joaquin Helicopters). This re-

lationship is made clear in the contract between the State of California and San Joaquin Helicopters, which states that employees of the contractor are not agents and employees of the State of California (see the specific contract clause to this effect cited in Section IV an page 7). Lawrence Groff was hired and paid by San Joaquin Helicopters which had, under its contract with the State, a clearly superior right of control as his employer. The company could remove Mr. Groff from his assignment to the California Department of Forestry at any time and could otherwise direct the performance of his duties other than when he was flying on a Department of Forestry mission.

In a similar case, Holstine v. LEAA, No. 80-7477 (United States Court of Appeals for the Ninth Circuit) August 4, 1982, the Court held that the Plaintiff "failed to show that Congress intended to compensate privately employed persons engaged in firefighting activities, or that Congress believed there was a need to encourage the recruitment of such privately employed persons," The Court in, Holstine agreed with the Law Enforcement Assistance Administration that the statute's legislative history and California law showed that the Plaintiff was not entitled to the PSOB benefit.

VI. Determination

Having carefully examined the facts and arguments presented in this case, the denial of PSOB benefits is hereby sustained

Robert J. Gehignani Administrative Hearing Officer

US Department of Justice

Office of Justice Programs
Bureau of Justice Assistance
Washington, DC 20531

PUBLIC SAFETY OFFICERS' BENEFITS CLAIM DETERMINATION

Case Number: 2002-158
Full Name: Lawrence Lafayette Groff
Title: Airtanker Pilot
Department/Agency: San Joaquin Helicopters
City, State, Zip Code: Delano, California 93215

Case Summary: On August 27, 2001, a vegetation fire was report burning outside of Hopland, California (A subsequent investigation determined that the fire was caused by a drug laboratory operation.) Several aircraft were dispatched by the California Department of Forestry and Fire Protection, and they engaged in fire suppression activities, including water and retardant drops and air tactical operation Approximately three hours after the fighting effort began, two of the participating airtankers collide mid-air and crashed to the ground. The two aircraft pilots, Lawrence L. Groff and Lars B. Stratte, were pronounced dead at the seen of multiple traumatic injuries.

Determination: Based on the Report of Public Safety Officer's Death submitted by the California Department of Forestry and Fire Protection, the Claim for Death Benefits submitted by his spouse, Christine Groff , and an analysis of the evidence presented in this case, the Bureau of Justice Assistance (BJA) has determined that the death of Airtanker Pilot Lawrence L. Groff not covered under the Omnibus Clime Control

and Safe Streets Act of 1968 (42 USC 3796), , amended, and 28 C.F.R. part 32 .

Survivors:	Name	Relationship	DOB
	Christine Groff	Spouse	N/A
	Michael Wells	child	3/14/85

Under the Public Safety Officers' Benefits (PSOB) Act and regulations, program benefits are authorized to be paid to the survivors of public safety officers found to have died as the direct and proximate, result of a personal injury sustained in the line of duty, 42 U.S.C. 3796, and 28 C.F.R. 32.1(a).

A "public safety officer" is defined as "any individual serving a public agency in an official capacity, with or without compensation, as a law enforcement officer, firefighter, rescue squad member or ambulance crew member." 42 U.S.C. 3796b(7) and 28 C.F.R. 32.2(j). a "public agency" is defined as "the United States, any State of the United States. . . or any unit of local government, department, agency, or instrumentality of any of the foregoing," 42 U.S.C. 3796b(6) and 28 C.F.R.32.2(k).

The death of a privately-employed worker who has been contracted by a public agency is not covered by the PSOB Act. (See the attached case of Holstine v. LEAA, No. 80-7477 (U.S. Court of Appeals, August ,1982) and Administrator's Final Decision, July 8, 1980 concerning contract workers,) Airtanker pilot Groff's death certificate and other documentation submitted

support of this claim identify him as an employee of San Joaquin Helicopters, a private company, and a report from the National Transportation Safety Board notes that the company provided the contract airtanker pilots to fight the fire on August 27, 2001. In addition, a contract provided by the California Department of Forestry and fire protection states that "[t]he Contractor, and the agents and employees of the Contractor, in performance of the agreement, shall act in an independent capacity and not as officers or employees or agents of [the] State of California."

Based on the evidence presented in this case, we have determined that at the time of his death Airtanker Pilot Lawrence L. Groff was not functioning as a public safety officer as defined by the PSOB Act and set forth in the PSOE regulations. Therefore, Airtanker Pilot Groff survivors are ineligible to receive the benefit authorized to be paid through the PSOB Program.

10/17/02

US DEPARTMENT OF JUSTICE
OFFICE OF JUSTICE PROGRAMS
BUREAU OF JUSTICE ASSISTANCE
WASHINGTON, DC

FINAL AGENCY DETERMINATION
PSOB Claim No. 02-158
Air-Tanker Pilot Lawrence Groff

On August 27, 2001, Lawrence Groff (the "decedent"'), was piloting an air-tanker engaged in fire suppression activities, including water and retardant drops and air tactical operations. Several hours into this operation, Mr. Groff's air-tanker collided with a second airtanker and crashed to the ground, Mr. Groff s death was caused by traumatic injuries sustained as a result of this mid-air collision near Hopeland, CA. He was, at the time of his death, employed by San Joaquin Helicopters (SJH), a private corporation that had entered into a contractual agreement with the California Department of Forestry and Fire Protection ("CDFFP") to render air-tanker services for fire suppression purposes.

On October 31, 2002, the Public Safety Officers' Benefits ("PSOB") Office issued an initial determination denying a death benefit claim filed by the decedent's wife, Mrs. Christine Wells Groff (the "claimant").fn1 The PSOB Office denial concluded that Air-Tanker Pilot Groff "was not functioning as a public safety officer as defined by the PSOB Act and set forth in the regulations." The initial denial determination also explained.

> The death of a privately-employed worker who has been contracted by a public agency is not covered by the PSOB Act, (See the attached case

> of Holstine v. LEAA, No. 80-7477 (U.S., Court of Appeals, August 4, 1982)fn2 and Administrator's Final Decision, July 8, 1980 concerning contract Workers. Air tanker Pilot Groff's death certificate and other documentation submitted in support of his claim identify him as an employee of San Joaquin Helicopters, a private company, and a report from the National Transportation Safety Board notes that the company provided the contract air tanker pilots to fight fire on August 27, 2001. In addition, a contract provided by the California Department of Forestry and Fire Protection states that "[t]he Contractor, and the agents and employees of the Contractor, in the performance of the agreement shall act in an independent capacity and not as officers or employees or agents of [the] State of California.,"

The claimant appealed this initial determination pursuant to 28 USC § 32,24(a); in so exercising this right, she waived her opportunity for a formal hearing but offered additional documentary evidence and arguments which she contended supported her claim. On February 20, 2004, the assigned hearing officer, Mr. Robert Gemignani, issued a determination consistent with the PSOB Office's initial determination denying benefits. In finding claimant to be ineligible for the PSOB death benefit, the hearing officer concluded that the decedent was not serving a public agency in an official capacity and thus, he was not a covered "public safety officer," as required under 42 U.S.C. § 3796 ("PSOB Act") and 28 C.F.R. Part 32 ("PSOB regulations").

Under 28 C.F.R. § 32.24, any claimant determined ineligible by a hearing officer may ask the Director of the

Bureau of Justice Assistance ("BJA"') to review the, record and make a final agency determination on the issue of claimant eligibility. The claimant now Seeks such a review of the record by me, as the BJA Director. In order for claimant to be deemed eligible to receive the PSOB death benefit, pursuant to 42 U.S. C. § 3796(a), she must provide. evidence to show that decedent was a "public safety officer serving public agency in an official capacity," as required by 42 U.S.C. § 3796(a), 42 U.S.C. § 3796b(8)(a) and 28 CF.R. § 32.21.

I have reviewed the documentation and considered the claimant's comments, as reflected in her February 9, 2005, request for review ("Claimant's Brief and Argument to BJA"), and find that they do not constitute new evidence, for this appeal.. On April 13, 2005, pursuant to 28 C.F.R. 32.21 (a) & (b), I re-opened the comment period and asked the claimant for personnel documentation retained by SJH and CDFFP, including but not limited to, any agreements or waiver's of rights, and death and/disability benefit documentation. I also asked the claimant to provide me with a copy of the agreement, between SJH and CDFFP, that was in effect on the date of Mr. Groff s tragic death. Counsel for the claimaint indicated on May 16, 2005, that claimant's efforts to obtain documentation from Mr. Groff's former employer, SJH, were unavailing.fn3 I thereafter issued a subpoena to SJH directing the production of the requested documents., SJH's response to this subpoena was received by BJA on June 14, 2005. Shortly thereafter, claimant's counsel asked that the conment period be deemed closed as of June 27, 2005 and I acceded.

The record with respect to this claim now having been closed, I find that it reveals nothing relevant to the

claimant's eligibility determination that contradicts the factual findings of the hearing officer, or is sufficiently significant to merit overturning those, findings. Therefore, as the BJA Director, I hereby adopt the findings of fact reflected in the hearing officer's determination as well as the following facts, which I find determinative as to claimant eligibility.

Findings of Fact

1. At the time of his death, the decedent was an air-tanker pilot employee for SJH, a private sector employer. See Death Certificate, National Transportation Safety Board Investigative Report.,
2. The decedent was hired by SJH, as a pilot employee on April 7, 1997.fn4 One year thereafter, in April 1998, Mr. Groff signed a disciplinary policy reflecting his acceptance of the following terms and conditions of employment.fn5

   Terms and conditions of employment with San Joaquin Helicopters may be modified at the sole discretion of the company with or without cause and with or without notice. Examples of the types of terms and conditions of employment which are within the sole discretion of the employer are decisions regarding compensation; benefits; qualifications; discipline; layoff or recall; rules; hours and schedules; work assigmments; job duties and responsibilities; production standards; consolidation of operations; determinations concerning the use of equipment; methods of facilities; or any other terms or conditions that the company may determine to be necessary for

the safe, efficient and economic operation of its business.

3. At the time of decedent's death, there was in effect an SJH/CDFFP agreement fn6 ("Agreement") made as of December 19, 1995, and renewed annually thereafter, pursuant to which SJH employee Groff was rendering piloting, services to CDFFP.

4. The Agreement includes the following "standard agreement" provisions:

> The Contractor [SJH] mess to indemnify, defend and save harmless the State from any and all claims and losses accruing or resulting to any and all contractors .. . laborers and any other person...furnishing or supplying work services...in connection with the performance of this contract, and any and all claims and losses accruing or resulting to any person.. . who may be injured or damaged by the Contractor in the performance of this contract.

The Contractor [SJH], and the agents and employees of the Contractor, in

> the performance of this agreement, shall act in an independent capacity and not as officers or employees or agents of the State of California. (Emphasis added).

5. Pursuant to the Agreement Exhibit A, Par. 1.9, SJH agreed to provide SJH employees servicing the Agreement with wages and employee bene-

fits.

6. Pursuant to the Agreement, Exhibit A, Par. 1.0, SJH, at its own expense, agreed to maintain numerous types of liability insurance as well as workers compensation covering SJH employees servicing the Agreement.

7. Under the Agreement, Exhibit A, Par. 4.15, SJH agreed to pay financial penalties imposed for specified instances of possible SJH pilot nonperformance, including the following: "pilot not available during scheduled duty period, pilot does not respond when paged, pilot does not arrive within one hour when paged, pilot failure to become airborne within 10 minutes from time of dispatch, pilot not wearing required safety clothing, pilot fails to wash off retardant from airplane, pilot exceeds flight duty limits." Under the same provision, SJH is also required to bear the cost of training a replacement pilot when an SJH "Pilot does not meet State certification requirements after training, pilot quits prior to end of annual flight duty period, pilot certification is revoked by state, pilot is terminated by the contractor."

8. On August 27, 2001, Mr. Groff was providing airtanker piloting services pursuant to the Agreement by responding to a CDFFP dispatch for fire suppression help. When he was so engaged, the CDFFP air tanker which he was piloting collided, in mid-air, with another air tanker.fn7 The tragic collision resulted in the death of Mr. Groff and another air tanker pilot.

9. The survivors of the decedent were not eligible for and did not receive State of California firefighter benefits as a result of the decedent's tragic death. See Report of Public Safety Officer death form, p., 2; claimant nowhere represents that she ever applied for or received an award of benefits from the State of California or CDFFP based specifically on alleged state firefighter status.fn8 Claimant was provided a State Workers Compensation dependency benefit award by virtue of decedent's employment with SJH fn9

Conclusions of Law

1. SJH is not a "Public agency"' within the meaning of the PSOB Act.fn10

2. The PSOB Act provides death benefits to certain survivors of "Public safety officer[s who are] determine[d by BJA], under regulations issued pursuant to [the PSOB Act, to have] died as a direct and proximate result of a personal injury sustained in the line of duty." 42 U.S.C. § 3796(a).fn11 A covered "public safety officer," in turn, is defined, in relevant part, as "an individual serving a public agency in an official capacity, with or without compensation as a fire fighter..."fn12 Thus, in order to qualify as a covered firefighter under the PSOB Act, claimant must show that the decedent was a public safety officer serving the CDFFP in an official capacity.

3. Holstine v LEAA, supra, is legally informative, factually relevant precedent. Just as in the case at issue, in Holstine, a widow of a privately- em-

> ployed pilot, who died during State of California fire fighting operations, claimed that her husband's death was covered by the PSOB Act because, he died while "pilot[ing] a plane for a state official."fn13 BJA's predecessor, the Law Enforcement Assistance Administration ("LEAA"), disagreed, U.S., Department of Justice, Legal Interpretations of the Public Safety Officers' Benefits. Act ("USDOJ, Legal Interpretations"), Administrator's Final Decision, July 8, 1980, pp7-10 (1981). LEAA determined that the pilot's widow was not entitled to PSOB benefits because the pilot was neither a public safety officer nor serving a public agency in an official capacity, Id. LEAA concluded that the pilot was not a public safety officer because he had been hired and paid by a private flying service that exercised superior control over its employee. Id. Although the private employer could not remove the pilot from a Forest Service mission, at all other times it could direct the pilot's performance of his duties. Id. Furthermore, as the pilot was flying for a private company, he was not recognized or designated to have been serving a public agency in an official capacity.

The Holstine claimant appealed LEAA's denial of her claim to the Ninth Circuit Court of Appeals. The Ninth Circuit, however, in an unpublisbed decision (cited above), agreed with LEAA's denial, stating that

> the [PSOB] state's legislative history and California law show that Holstine is not entitled to benefits. See Russell v. LEAA 637 F2d 1255, 1261 & n. 13 (9th Cir 1980). Holstine has failed to

> show that Congress intended to compensate privately employed persons engaged in firefighting activities, or that Congress believed there was a need to encourage the recruitment of privately employed persons. fn14

Similarly, in the present claim, the decedent is not a covered PSOB Act public safety officer because, like Mr. Holstine, Mr. Groff was a privately-employed pilot.fn15 It is noteworthy that at not time has the claimant contended that Mr. Groff was a public employee of the State of California. Indeed, she concedes in her brief that he was not a public employee.fn16 Consequently, the determinative issue in this claim is whether a privately-employed pilot rendering fire suppression assistance to a public agency under a contract with the public agency is covered by the PSOB Act.

4. The statutory requirement that an individual "serv[e] a public agency in an official capacity" is not defined by statute or regulation.fn17 In Holstine, however, the LEAA Administrator interpreted this requirement to mean that the individual must be "an officer, employee, volunteer, or [be in a] similar relationship of performing services as part of a public agency,"' USDOJ, Legal Interpretations, p. 9, and adding that "[t]o have such a relationship with a public agency, an individual must be officially recognized or designated as functionally within or part of the public agency."

In Chacon v, United States, 48 F.3d 508, 512 (Fed. Cir. 1995), the U.S. Court of Appeals for the Federal Circuit expressly examined this Holstine interpretation of the

PSOB Act and found it to be both reasonable and entitled to deference under the rule in Chevron v. Natut-al Resources Defense Council, 467 US. 837 (1984). In so doing, the Federal Circuit affirmed the U.S. Court of federal Claims decision in the same Chacon case, 32 Fed. CL 684, 687-688 (1995), which cited the Holstine interpretation as a reasonable precedent for finding in favor of BJA against a PSOB claimant; the interpretation favorably validated by the Court of Federal Claims is that "one who works for a government contractor does not thereby acquire the requisite relationship to the contracting agency" to qualify for coverage under the PSOB Act.fn18

Implicit in the Chacon and Holstine holdings is the understanding that no evidence exists to suggest any intention in the PSOB Act to treat privately-employed firefighters in a manner similar to firefighters meeting the statutory definition of public safety officers serving a public agency in an official capacity. Therefore, the claimant is not eligible to receive the PSOB death benefit because Mr. Groff was not functionally within or a part of the CDFFP; he ultimately served under the direction of his Private-sector employer.fn19

5. Although the claimant is correct in stating that "[t]here can be no serious dispute that air tanker services are a critical part of a governmental firefighting efforts, particularly in western states,"fn20 this fact, which we do not dispute, does not make a contractor's employees, such as the decedent, a functional part of the state public agencies, or confer "official capacity" status upon them, within the meaning of the PSOB Act (among other Federal statutes).

Cases applying provisions of the Federal Tort Claims Act, 28 U.S.C. §§ 2671- 80 ("FTCA"), are informative in this regard.fn21 The FTCA constitutes a limited waiver of
sovereign immunity and permits the United States to be sued for the negligence of its employees: "'The [FTCA] defines 'employee of the government' to include officers or employees of any federal agency..., and persons acting on behalf of a federal agency in an official capacity...." Leone v. United States, 910 F2d 46, 49 (2d Cir.. 1990) (emphasis added) (citing § 2671).

Much as with the claim at issue, Letnes v. United States, 820 F.2d 1517 (9th Cir. 1987), involved a co-pilot employee of a private company who had contracted with the United States Forest Service to carry and drop fire retardant. The Ninth Circuit held that the widow of the co-pilot, who was killed while performing duties under the contract, could not recover against the United States under the FTCA. Following Supreme Court precedent indicating that detailed regulations and inspections are no longer evidence of an employee relationship,fn22 and citing Ducey v. United States, 713 F.2d 504, 516 (9th Cir. 1983), the Ninth Circuit held "that the ability to compel compliance with federal regulation does not change a contractor's personnel into federal employees." Also, in finding that the district court had erred in holding that the contractor pilots were covered for FTCA purposes, the court observed:

> Most of the contractual provisions referred to by the district court as indicia of employee status are...regulation-mandated contractual restrictions . . . that are designed to secure federal objectives and that, despite their restrictive effect

> on the activities of the contracting party, do not convert an independent entrepreneur into an 'agent' of the federal government. . . These provisions are designed to secure minimum safety not to control the detailed physical operation of the plane. Other contract provisions requiring pilot certification, maximum work hours, and inspections are similarly designed to satisfy the government's safety objectives.

Letnes, 820 F.2 d at 1517.

The numerous requirements and contract provisions cited by claimant as evidence of CDFFP "employment" of control over the decedent are, similarly, simply designed to satisfy the U.S. Government and State of California's safety objectives. See Claimant's Brief and Argument to BJA, pp. 8-9. While the requirements cited by claimant allowed CDFFP to predictably, safely and effectively utilize contractor services, these provisions are not tantamount to State "supervision of day-to-day operations of the contractor," so as to confer agency status or authorize the decedent to serve the CDFFP in an official capacity.fn23 Indeed, failure by SJH employees to conform with State requirements resulted in penalties imposed on SJH, not SJH employees; it was SJH, the private company, that was, in the end, responsible for its employee performance or non-performance, of services under the Agreement.See Finding of Fact No. 7, supra.

6. The following facts, in combination, demonstrate conclusively claimant's failure to show that decedent was serving the State of California in an official capacity as a functional part of the

CDFFP.fn24 (a) The Agreement expressly states that SJH employees were to act "in an independent capacity and not as officers or employees or agents of the State of California;"(b) SJH agreed to indemnify the State with respect to any potential claims brought by persons furnishing services under the Agreement and who might suffer, injury or personal loss, i.e. Mr. Groff's survivors; (c) While CDFFP directed Mr. Groff in the performance of his duties,fn25 the decedent was hired and paid by SJH which had, under its Agreement with the State, a clearly superior right of control as his employer, i.e., the company could remove Mr. Groff from his assignment to the CDFFP at any time and could otherwise, direct the performance of his duties other than when he was flying on a CDFFP mission. Hearing Officer Determination, p.8; fn26(d) Mr. Groff expressly acknowledged SJH's assertion of discretionary authority regarding a broad spectrum of decedent's employment terms and conditions (See Finding of Fact No. 2, supra); (e) All compensation and benefits provided to the decedent, or his survivors, were made available through SJH;fn27 (f) SJH assumed responsibility for obtaining liability insurance to address potential third party claims; and, finally and most significantly,(g) SJH agreed to pay penalties incurred with, respect to specific instances of pilot employee unsatisfactory or non-performance of services and /or to train replacement pilots, under certain circumstances" With respect to decedent, SJH was far more than "mere conduit to provide pay to [Mr. Groff. fn28 Indeed, such a representation by CDFFP, and others recounted

by claimant in Claimant's Brief and Argument to BJA, pp. 6-7, are plainly inconsistent with the above-cited terms of the CDFFP /SJH Agreement. fn29 Nowhere in Claimant's Brief and Argument to BJA are the legal effect of these provisions even addressed.

7. The CDFFP/SJH Agreement expressly states that SJH employees were to act "'in an independent capacity and not as officers or employees or agents of the State of California." "A contract must be so interpreted as to give effect to the mutual intention of the parties, as it existed a the, time of contracting..." Cal. Civ. Code § 1636. This Agreement provision shows that it simply was not the intention of SJH or CDFFP that SJH employees would become a functional part of CDFFP or were expected to serve in an "employee or agent like" relationship with a public agency, Chacon, supra,, quite the opposite is the case in this instance., Thus, Mr. Groff was not serving a public agency, CDFFP, in an official capacity, at the time of his death.

8. The CDFFP/SJH Agreement offers the State of California numerous advantages in that it allows the state to draw from a reservoir of fire fighting services, necessary for protecting the public, without obligating the state directly to those individuals performing the services, the state has no obligation to provide SJH employees with respect to compensation or to provide costly state-sponsored benefits; the state is not responsible for possible third party liability; and, the State is indemnified by SJH regarding possible actions

that SJH employees may have against the State. Moreover, the State does not carry the burden of hiring pilots or managing performance issues; it can simply impose a financial penalty on SJH pursuant to the contract. These advantages are brought to bear only because of the Agreement which removes SJH employees from the State of California and through which SJH agreed that SJH employees "act in an independent capacity and not as officers or employees or agents of the State of California." Stated alternatively, it was the intention of both parties to the Agreement that SJH employees not be a functional part of the CDFFP; this was necessary in order for the State to enjoy the above-cited benefits bargained for under the Agreement.

9. The claimant further contends that there is a legislative intention that air-tanker contractors qualify for PSOB Act benefits. Claimant's Brief and Argument to BJA, p, 18-19. In support of this contention, the claimant points to a PSOB benefit purpose, identified in the education benefit section of the PSOB Act: "The Purposes of this part are (1) to enhance the appeal of service in public safety agencies..." 42 U.S.C. § 3796(d) (emphasis added).

This argument, however, serves only to establish the unremarkable legal fact that BJA may not unilaterally extend the coverage of the PSOB Act to private sector workers. Mr. Groff's piloting services were not rendered "in" a public agency; they were rendered as a consequence of his private sector SJH employment and the Agreement that his employer had entered into with a

public agency.

The budgetary constraint issues confronted by air-tanker contractors, as described by claimant (Claimant's Brief and Argument to BJA, p. 19), simply were not considered or the aim of redress by the Federal Government lawmakers, upon the enactment of the PSOB Act, and its amendments, nor was the plight of private sector workers engaging in hazardous duty professions. If such considerations were addressed and the PSOB Act was drafted to cover private sector air-tanker pilots, Federal benefit coverage would likely be an implicit bargaining advantage for public agency parties to agreements such as the Agreement central to this claim.

10. The claimant is incorrect in arguing that "[g]ranting benefits to Ms. Groff... is not an extension of the PSOB [Act]." Claimant's Brief in Support of Benefits under the PSOB Act, p. 19., But even if it were only a minor extension of the PSOB Act, such an extension would clearly be beyond BJA's lawful authority: BJA has a legal duty to adhere to the statutory provisions of the PSOB Act (and to whatever PSOB regulations may be in effect from time to time). The Act places the burden upon the claimant to produce evidence that the decedent was a public safety officer serving a public agency in an official capacity, see, e.g., Tafoya v. United States, 8 Cl. Ct. 256, 264, n.6 (1985), which this claimant has failed to do; all claimant proffered were CDFFP assertions of "official recognition of public safety officer status" which were made after Mr. Groff's death and, at times, specifically for the well-

intentioned, but mis-guided purpose of assisting the claimant in qualifying for the PSOB Federal benefit,fn30 For BJA to authorize the payment of benefits to a claimant unable to meet the ordinary burden of proof alone would be an unauthorized extension of the PSOB Act. In any event, the claimant has not shown that Mr. Groff was a public safety officer serving a public agency in an official capacity, and the evidence before me indicates that he was neither a public safety officer nor serving the CDFFP (or any other public agency) in an official capacity. Therefore, I am without authority to approve the payment of PSOB Act death benefits here, and the claim must be deniedfn31

10. The claimant contends "to deny Larry Groff benefits when the DOJ/BJA grants benefits to other private/contract employees, is arbitrary and capricious." Claimant's Brief and Argument to BJA, p., 25. Claimant states that "(f)undamental fairness dictates that Larry Groff's family be treated as well as the families of deceased [9/11] ambulance drivers, and that benefits be awarded "Claimant's Brief and Argument to BJA, 21). Setting aside claimant's notions of "fundamental fairness," the law simply does not allow claimant's claim to be reviewed under the same procedures as the claims filed as a consequence of the terrorist attacks of September 11, 2001.

Pursuant to sections 611 and 612 of the USA PATRIOT Act, Pub., L. No. 107-56, 115 Stat. 272, 369 (Oct. 26, 2001), (under circumstances where those sections ap-

ply), BJA is authorized statutorily to accept, as prima facie evidence sufficient to authorize PSOB Act payments to qualified beneficiaries, certifications from public agencies that public safety officers employed by such agencies were killed or suffered catastrophic injuries producing permanent and total disability as a direct and proximate result of personal injuries sustained in the line of duty in connection with prevention, investigation, rescue, or recovery efforts related to those circumstances. Thus, these two sections create a statutory distinction between PSOB claims arising from circumstances described therein (where acceptance of certifications as prima facie evidence is authorized) and all at other PSOB claims (where acceptance of certifications as prima facie evidence is not authorized).

Pursuant to section 612, BJA paid certain PSOB Act claims arising from the September 11th deaths of some privately- employed ambulance-crew members who were certified by a New York public agency expressly to be "public safety officer's employed by such agency": In keeping with section 612 of the USA PATRIOT Act, BJA accepted this express certification as prima facie evidence of what it certified, and (therefore) conducted no full-blown or rigorous analysis of the legal issues that might be in play there. Thus, the claimant's contention that the awarding of PSOB Act benefits with respect to these privately-employed individuals killed on September 11th "confirms" that privately-employed individuals are not disqualified compares apples to oranges, the claimant fails to recognize that the statutory scheme authorizing payment to privately employed ambulance drivers after September 11 (pursuant to sections 611 and 612 of the USA PATRIOT Act), and the statutory scheme denying payment to the claimant

(pursuant to 42 U.S.C. § 3796(a)) are distinctly different. Unfortunately for the claimant here, the State of California's attempt to certify that Mr. Groff was "duly recognized and designated as [a] firefighter pilot by the State of California,"fn32 cannot be statutorily entitled to treatment as prima facie evidence, because the (terrorism-related) circumstances that bring sections 611 and 612 to bear are not present; accordingly, I am not permitted to pay on the claim until Mrs. Groff has provided sufficient evidence that the decedent was such a "public safety officer." This she has failed to do.

12. The claimant erroneously contends that given the payments of PSOB Act benefits with respect to the above-described ambulance crew members killed on September 11th, the subsequent denial by BJA of PSOB Act benefits to the claimant constitutes a violation of the Equal Protection Clause of the Fifth Amendment of the U S.. Constitution. Regardless of the correctness of BJA's PSOB Act payments with respect to those ambulance crew members, the denial of such benefits to the claimant is certainly not a violation of the Equal Protection Clause, if only because the ambulance crew members were not situated similarly to Mr. Groff. The Equal Protection Clause "does not require that all persons everywhere be treated alike. Instead, it imposes the rather more modest requirement that government not treat similarly situated individuals differently without a rational basis." Noble v United States Parole Commission, 194 F. 3d 152,154(DC Cir. 1999). Quite simply, the ambulance crew members and the claimant's decedent are not similarly situated individuals, because

(unlike the case applicable to the claimant here) the payments made with respect to the former were based on a certification by a public agency that BJA was statutorily authorized to accept; BJA, thus, had a rational basis for. its determination to pay on those claims, and did not act arbitrarily or capriciously.fn33 The most that the claimant arguably may show on this point is that BJA's payments with respect to the ambulance crew members may have been made erroneously; such an "error, however, can furnish no ground for its being adopted by [me]"fn34

Decision

Based on the above-stated findings of fact and conclusions of law in this case, I hereby affirm the hearing officer's denial of PSOB Claim No. 2002-158. Accordingly, the final agency decision is that claimant is not eligible to receive the PSOB death benefit.

Footnotes

Fn1 Mrs. Groff also filed the PSOB Death Benefit Claim form on behalf of the decedent's nor step-child.

Fn2 Holmes v. Dep't of Justice, No. 80-7477, slip op. (9th Cir. Aug. 4, 1982), 688 F 2d. 846 (table).

Fn3 SJH indicated to claimant's counsel that it was unwilling to provide the requested documents absent a subpoena

Fn4 See documents produced by SJH on June 14, 2005, in response to BJA subpoena and specifically, the dece-

dent's application for employment and state compensation insurance fund documentation.

Fn5 Mr Groff signed other similar statements throughout his tenure with SM.

Fn6 This Agreement between CDFFP and SJH, was in effect at the time of the fatal collision, and was provided by CDFFP on September 6, 2002, upon request by the PSOB Office. An executed copy of the Agreement was thereafter provided by SM in response to a subpoena issued by BJA

Fn7 Both air tankers were owned and operated under the control of CDFFP for fire suppression. See NTSB Report; claimant's request for review, p. 5.

Fn8 It is noteworthy that Cal Gov. Code § 19886 .2 expressly provides that "[n]othing in this article [Article 6. Firefighters] that shall be deemed to: (a) Require the extension of any benefits to a firefighter who at the time of his or her injury, death, or disability is acting for compensation from one other than the state"

Fn9 See documents produced by SJH on June 14, 2005, in response to a subpoena issued by BJA

Fn10 See 42 U S C. § 3796b(7) ("'public agency' means the United States, any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, Guam, American Samoa, the Trust Territory of the Pacific Islands, the Commonwealth of the Narthex. Mariana Islands, and any territory or possession of the United States, or any unit of local government, department,

agency, or instrumentality of any of the foregoing[.]")

Fn11 BJA is authorized to interpret and administer this statutory benefit program. 42 U, S. C. § 3796c(a).

Fn12 42 U..C § 3796b(8) (emphasis added), "'Firefighter' includes an individual serving as an officially recognized or designated member of a legally organized volunteer fire department...Id. § 3796b(4); 28 CFR § 32.2(n)

Fn13 Claimant is incorrect in characterizing Holstine as a case involving private security guards. See Claimant's Brief and Argument, p. 23

Fn14 The legislative history relied upon by the court in Holstine, supra, can be found in the following colloquy, in which Congressman Joshua Eilberg, the sponsor in the House of Representatives of the bill that became the PSOB Act, responded to a direct question as to whether persons employed by private companies would be covered:

> Mr. Myers of Pennsylvania: "Could the gentleman tell me, is there any way in which this bill would apply to privately employed safety or security officers?"
> Mr. Eilberg: "No, it would not."
> Mr. Myers: "What if they were called by a local arm of the government of the local police organization to assist in any way?"
> Mr. Eilberg: "It is my opinion that they would not be covered," 122 Cong. Rec. H3725 - 26 (daily ed. Apr. 30, 1976).

Fn15 In response to a BJA inquiry regarding the dece-

dent's employment status, CDFFP responded as follows: "The coroners Death Certificate listed San Joaquin Helicopters as the employer This is a true statement," See September 3, 2002 letter by W. David Wardall, Deputy Chief; Aircraft Maintenance and Engineering CDFFP

Fn16 Claimant's Brief and Argument to BJA, p 18.

Fn17 Such "servi[ce]" may be "with or without compensation," 42 USC. § 3796b(8)(A); 28 C.F.R., § 32-2(j)

Fn18The decedents in Chacon were inmates of the Arizona Department of Corrections who volunteered to fight wildfires under a contract between the Arizona Land Department and the Arizona Department of Corrections. Chacon, 32 Fed. Cl. 684, 688

Fn19/ See 1998 SJH Disciplinary policy acknowledged by Mr. Groff and produced by SJH in response to BJA's May 18, 1995 subpoena.

Fn20 Claimant's Brief and Argument to BJA, p. 2.

Fn21 I do not find claimant's reliance on Maryland case law, based on Maryland statutory authority, to be persuasive precedent in examining the legal issues attendant to this claim. See Claimant's Brief and Argument, p. 17 Federal law, not state law, controls the meaning of a Federal statute.

Fn22 Logue v. United States, 412 US 521(1973); United States v . Orleans, 425 id 807, 814 - 815 (1976), holding that the government may be sued for the actions of a government contractor and its employees only

if the government has the authority "to control the detailed physical performance of the contractor and supervise day to day operations."

Fn23 See Letnes 820 F.2d at 1517; cf Cockrell v United States, 86 F Supp.994, 1004 (SD Cal 1999), describing at length the inherent professional autonomy of air-tanker pilots in the performance of their services: "the pilot-in-command had the final say and could refuse instructions deployment from the Government fire controller if the pilot deemed deployment unsafe...All decisions on how to actually make the drop were make by the tanker pilot. Actual physical operation of the controls of the aircraft, e.g., speed, flaps, etc , were a part of making a safe and effective drop... These decisions are by the tanker pilot..."

Fn24 Cf Leone,supra,where the Second Circuit held that certain aviation medical examiners (AMEs), who had examined a pilot that had suffered a heart attack resulting in a plane crash, were not government employees (i.e. were not acting on behalf of a federal agency in an official capacity) for purposes of the FTCA. In reaching this conclusion, the court cited section 220(2) of the Restatement (Second) of Agency,

> which provides that in determining whether one acting for another is an employee or independent contractor, the following relevant factors are to be considered: the extent of control which by agreement the master may exercise over the details of the work; whether or not the one employed is engaged in a distinct occupation or business; the kind of occupation,with reference to whether the work is usually done under the di-

> rection of the employer or by a specialist without supervision; the skill required in the particular occupation; whether the employer or workman supplies the instrumentalities, tools and place of work; the method of payment.

As with the AMEs considered in Leone, the federal government cannot maintain control over the detailed physical performance of services rendered by skilled professional pilots, such as Mr. Groff. See, Cockrell, supra. Moreover (to paraphrase Leone) "also instructive [here] is the fact the [USFS] provides no insurance, and does not pay workers' compensation or social security taxes" for SJH pilots, such as the decedent.

Fn25 See Claimant's Brief and Argument to BJA, pp-8-10. However, cf Cockrell v. United States. 86 F Supp 994(S.D. Cal 1999), where the autonomy of air tanker pilots, in the performance of their services, was described at length: "the pilot-in-command had the final say and could refuse deployment instructions from the Government fire controller the pilot deemed deployment unsafe. . .. All decisions on how to actually make the drop were make by the tanker pilot Actual physical operation of the controls of the aircraft, e.g., speed, flaps, etc, were a part of making a safe and effective drop. These decisions are by the tanker pilot." Id at 1004

Fn26 It is noteworthy that upon the comment period, I asked claimant to provide me with personnel documentation retained on file by CDFFP that was specific to Mr. Groff. Apparently no such documentation exists since none was provided to me by the claimant. Such documentation would have been relevant to determin-

ing the level of personal, day-to-day supervision of Mr. Groff by CDFFP, if any, during his lifetime. See 28 CFR 32.21(b): "Wherever a claimant for any benefit or fee under the Act and this part has submitted no evidence or insufficient evidence of any material issue or fact, the Bureau shall inform the claimant what evidence is necessary for a determination as to such issue or fact and shall request the claimant to submit such evidence within a reasonably specified time. The claimant's failure to submit evidence on a material issue or fact as requested by the Bureau shall be a basis for determining that the claimant fails to satisfy the conditions required to award a benefit or fee or any part thereof"

Fn27 Subsequent to Mr. Groff's death, the State of California enacted legislation making the State the "payer of last resort." In 2002, the State of California enacted Cal Pub. Res.Code § 4114 5 which now requires that all CDFFP contracts, executed to retain the services of pilots to fly fire fighting aircraft, to include a provision providing a state death benefit, in an amount equal to the PSOB Act death benefit, to be issued only in the event that the contract pilot's survivors are deemed ineligible to receive the PSOB death benefit. Under the Supreme Court's holding in Rose v Arkansas State Police, 4479 U.S. 1, 107 S. Ct. 334 (1986), `we believe this provision to be unconstitutional and, therefore, unenforceable. In Rose, id, the Supreme Court found an Arkansas workers' compensation statute which authorized the state to offset against workers' compensation benefits' o[t]herwise payable to a Police officers widow, PSOB benefits that the widow received under the PSOB Act. The Supreme Court found that the state statue conflicted with the supplementary na-

ture of the federal PSOB Act so as to be invalid under the supremacy clause. So too, with respect to the California statute, the State seeks to reserve for itself the illegitimate status as "payer of last resort, within the context of a PSOB eligibility determination and benefit payment.

Fn28 In a September 2002 letter, by David Wardall 'CDFFP Deputy Chief, Aircraft Maintenance and Engineers, there is an assertion that the decedent's employer SJH "was merely a conduit to provide pay to our pilot." Also see Claimant's Brief and Argument to BJA, p. 7

Fn29 It is noteworthy that the State of California requested that the DOJ to "provide an affirmative determination that Captain Groff's wife and children are entitled to the federal firefighter death benefit," Claimant's Brief and Argument to BJA, p6. As stated in footnote 24, supra, California recently enacted legislation making the State the "payor of last resort" in all like, future instances of contractor pilot death; the State provides a benefit equal to the PSOB death benefit by only in instances where the pilot's survivor is first denied the PSOB Federal death benefit

Fn30 See Claimant's brief and Argument to BJA, pp. 6-7. On April 13, 2005, I asked claimant to provide me with personnel documentation file with the CDFFP. Such documentation would have been relevant to my evaluation of CDFFP's relationship with Mr. Groff during the time he serviced the Agreement. Claimant, however, produced no such documentation in response to dais request, See 28 C.F.R. § 32.2 1 (b) (Whenever a claimant for any benefit...under the [PSOB] Act and

this [regulation] has submitted....insufficient evidence of any material issue or fact, [BJA shall inform the claimant what evidence is necessary for a determination as to such issue or fact and shall the request the claimant to submit such evidence within a reasonably specified time. The claimant's failure to submit evidence on a material issue or fact as requested by [BJA] shall be a basis for determining that the claimant fails to satisfy the conditions required to award a benefit...").

Fn31 I wish to make clear that I do not seek to diminish - in any manner - the enormous contributions made by airtanker contractors, nor to deny the serious risks that airtankers contractors face on a daily basis. See Claimant's brief in Support of Benefits under the PSOB Act, p. 31. Still less do I wish to suggest any lack of admiration for the gallantry shown by Mr LaBare or any lack of sympathy for the tragic loss suffered by his widow To authorize payment in contravention of the PSOB Act, however (whether occasioned by these considerations or others), is improper because it is beyond my statutory authority

Fn32 See September 3, 2002 letter by W David Wardall, Deputy Chief, Aircraft Maintenance and Engineering, CDFFP

Fn33 In LaBare v United States, No C04-4974, slip op (N D. Cal. Mar 10, 2005), like here, the widow of a contract pilot who was killed while fighting a fire sought the PSOB death benefit. After the denial of her claim by the PSOB Office on the same grounds, i.e., that the decedent was not a "public employee," the claimant filed a declaratory judgment action in the US Court for the Northern District of California. Upon dismissing her

complaint for lack of jurisdiction, the court stated:

> In her complaint, [Mrs. LaBare) also appears to assert that the denial of PSOB [Act] benefits to government contractors violates her Fifth Amendment right to equal protection. Assuming arguendo that the court has jurisdiction to entertain plaintiff's constitutional claim, the court would review the asserted equal protection violation under the 'rational basis' standard...Under this highly deferential standard o[f] review, there is no doubt that plaintiff's claim would fail as a matter of law.

Fn34 United States v. Gooding, 25 US (l2 Wheat.) 460, 478 (1827) (per Story, J); see Henslee v Union Planters Nat'l Bank, 335 & 595, 600 (1949) (Frankfurter, J. ,dissenting)

LEGAL INTERPRETATIONS OF THE PUBLIC SAFETY OFFICERS' BENEFITS ACT

OFFICE OF THE GENERAL COUNSEL

NOVEMBER 1981

OFFICE OF JUSTICE ASSISTANCE, RESEARCH, AND STATISTICS
US DEPARTMENT OF JUSTICE
WASHINGTON, DC 20531

Introduction

The Public Safety Officers' Benefit Act, Pub. L. 94-430, 42 U.S.C. 3796, et seq was signed into law on September 29, 1976. Since that time, the Law Enforcement Assistance Administration (LEAA) has examined over 1,500 claims for benefits from the survivors of law enforcement officers and firefighters who died in the line of duty. This volume is intended to inform the reader of LEAA's decisions on the principal legal issues that have arisen from those claims over the first five years of the Act's existence. The book is organized by topic and contains the legal opinions, agency determinations, and court decisions affecting each significant element of coverage and eligibility.

Those documents identified in this volume as "OGC Memoranda" are legal opinions written by the Office of General Counsel of the Office of Justice Assistance, Research, and Statistics (OJARS) and its predecessor, the LEAA Office of General Counsel. Documents identified as "Hearing Officers' Decisions" are decisions made by an LEAA hearing officer on a claimant's appeal from

the initial denial of his or her claim. Documents identified as "Administrator's Decisions" are the final agency decisions rendered by the Administrator of LEAA.

These documents have been edited for format, syntax, and clarity, but otherwise appear in all respects as they did when first written. Questions or comments concerning any aspect of this volume should be addressed to the OJARS Office of General Counsel, 633 Indiana Avenue, N. W., Washington, D.C. 2 531 /ATTENTION: David I. Tevelin, Acting Deputy General Counsel.

John J. Wilson Acting General Counsel OJARS Office of General Counsel

***

D. Contractors

July 8, 1980

Administrator's Final Decision

SUBJECT: Contract Pilot

I have completed a careful review of the file in the above claim, including your submission of February 27, 1980, commenting on the memorandum of Deputy General Counsel Charles A. Lauer. It is my determination, based on this review, that the agency Hearing Officer's December 14, 1979, determination of eligibility is erroneous and must be reversed.

The primary issue on appeal was whether the decedent was a "public safety officer" as this term is defined in

Section 703(7) of the Public Safety Officers' Benefits Act (42 U.S.C. 3796b). That section defines a public safety officer as follows:

"(7) `Public safety officer' means a person serving a public agency in an official capacity, with or without compensation, as a law enforcement officer or as a fireman.

The hearing officer determined that the decedent was "serving a public agency," the California Department of Forestry, as a fireman at the time of his death. He then determined that the service was "in an official capacity" based on principles of workmen's compensation law that distinguish an "employee" and an "independent contractor." Applying these principles, coupled with the "lent employee" and "dual employment" doctrines, the hearing officer concluded that there was an "implied contract of hire" arising out of Mr. H.'s flying under the direction of a Forest Service observer and out of the Forest Service's authority under its contract with He met galley Flying Service to set standby hours and determine the adequacy of pilot performance.

While these workmen's compensation principles and doctrines may be applied in making PSOB determinations in an appropriate case, I have concluded that they are not applicable here because of the clear evidence that Mr. H. was in fact, and in the intent of the parties, the employee of the He met Valley Flying Service. Mr. H. was hired and paid by the Hemet Valley Flying Service which had, under its contract with the State, a clearly superior right of control as his employer. The Flying Service could remove Mr. H. from his assignment to the Forest Service contract at any time and could otherwise direct Mr. H.'s performance of his du-

ties other than when he was flying on a Forest Service mission. The Forest Service exercised control only in limited ways over employees assigned to the contract of the Flying Service. Their authority was not specific to Mr. H. as an individual. The Hemet Valley Flying Service hired, assigned, and paid pilots and was free to remove any pilot from this assignment and substitute another pilot. Therefore, the superior right of control over Mr. H.'s employment was clearly in the Hemet Valley Flying Service as his employer. In addition, the contract between the State of California and the Hemet Valley Flying Service specifically provided that employees of the contractor were not agents and employees of the State of California:

"The contractor, and the agents and employees of contractor, in the performance of this agreement, shall act in an independent capacity and not as officers or agents of the State of California."

I find that the contract provision reflects not only the actual relationship between the parties but also the clear intent and understanding of the parties to the contract that employees of the contractor would not be employees of the Department of Forestry or the State of California. Further, I conclude that the "dual employment" and "lent employee" doctrines cited by the hearing officer are not applicable because Mr. H. never entered into any express or implied contract of hire with the Department of Forestry of the State of California.

Regardless of whether Mr. H. was or was not an employee of the Department of Forestry, State of California, under the principles and criteria discussed above, I

also find that he was not serving a public agency in an "official capacity," as required by law, at the time of his death. In order to be serving a public agency in an official capacity one must be an officer, employee, volunteer, or similar relationship of performing services as a part of a public agency. To have such a relationship with a public agency, an individual must be officially recognized or designated as functionally within or a part of the public agency.

Not only was Mr. H. acting in the' capacity of an employee of the Hemet Valley Flying Service, he was clearly not recognized or designated by the State of California as performing services in the capacity of a State officer, employee, volunteer, or other position with the State agency. In fact, the State's contract with the Hemet Valley Flying Service specifically denied any such relationship. In sum, Mr. H. was serving a private employer in an official capacity as an employee. Thus, even if the hearing officer were correct in determining that Mr. H. was serving as an employee of the State for Workmen's Compensation purposes, his "official capacity" remained that of an employee of the independent contract.

The legislative history of the Public Safety Officer's Benefits Act gives express guidance on the intended scope of the term "public safety officer." Congressman Joshua Eilberg, the House sponsor of the PSOB, bill, answered the question as follows:

"Mr. Myers of Pennsylvania: Could the gentleman tell me, is there any way in which this bill would apply to privately employed safety or security officers?"

"Mr. Eilberg: No, it would not."
"Mr. Myers of Pennsylvania: What if they were called by a local arm of the government or the local police organization to assist in any way?"

"Mr. Eilberg: It is my opinion that they would not be included,"

Cong. Rec. H.3725-26 (April 30, 1976, daily ed.)

There is no basis to conclude that Congress intended privately employed firefighters to be treated other than in a similar manner. The following additional findings of fact are adopted:

1. On August 18, 1978, Joe H. died of injuries sustained when the aircraft he was piloting crashed.

2. The aircraft was owned by the California Division of Forestry and was providing air coordination of firefighting activities at the time of the crash.

3. Mr. H. was accompanied in the aircraft by a Division of Forestry employee at the time of the crash. The employee's function was to direct the air coordinator pilot where to fly and at what altitude.

4. Mr. H. was employed as a pilot by the Hemet Valley Flying Service Co. The California Division of Forestry contracted with the He met Valley Flying Service for the provision of pilots for aerial coordination of firefighting activities during wildland fires.

5. The contract between the Hemet Valley Flying Service and the California Department of Forestry

provides, in part, that:

"The contractor, and the agents and employees of contractor, in the performance of this agreement, shall act in an independent capacity and not as officers or employees or agents of State of California.

6. The Hemet Valley Flying Service exercised primary control over the activities performed by its employee, Joe H., under the contract. The basic conclusion of law that I have reached is that the decedent was not a "public safety officer" as this term is defined in the Public Safety Officers' Benefits Act because he was not "serving a public agency in an official capacity ... as a law enforcement officer or as a fireman. "

As a result of my review, and for the reasons set forth above, the final agency determination is that the claimant is not entitled to benefits under the Public Safety Officer's Benefits Act of 1976 (Pub. L. 94-430, 90 Stat. 1346).*

CONTRACT PILOTS
July 8, 1980

Administrator's Final Decision

SUBJECT: Contract Pilot

I have completed a careful review of the file in the above claim, including your submission of February 27, 1980, commenting an the memorandum of deputy General Counsel Charles A. Lauer. It is my determination, based on this review, that the agency Hearing Officers December 14, 1979, determination of eligibility is erroneous and must be reversed.

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direction of a Forest Service observer and out of the Forest' Service's authority under its contract with Hemet Valley Flying Service to set standby hours and determine the adequacy of pilot performance.

While these workmen's compensation principles and doctrines may be applied in making PSOB determinations in an appropriate case, I have concluded that they are not applicable here because of the clear evidence that Mr. H. was in fact, and in the intent of the parties, the employee of the Hemet Valley Flying Service. Mr. H. was hired and paid by the Hemet Valley Flying Service which had, under its contract wit the State, a clearly superior right of control as his employer. The Flying Service could remove bra H. from his assignment to the Forest Service contract at any time and could otherwise direct Mr. H.'s performance of his duties other than when he was flying on a Forest Service mission The Forest Service exercised control only in limited ways over employees assigned to the contract of-the Flying Service. Their authority was not specific to Mr. H. as an individual. The Hemet Valley Flying Service hired, assigned, and paid pilots and was free to remove any pilot from this assignment and substitute another pilot. Therefore, the superior right of control over Mr. H.'s employment was clearly in the Hemet Valley Flying Service as his employer. In addition, the contract between the State of California and the Hemet Valley Flying Service. specifically provided that employees of the con-

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Regardless of whether Mr. H. was or was not an employee of the Department of Forestry, State of California, under the principles and criteria discussed above, I also find that he was not serving a public agency in an "'official capacity," as required by law, at the time of his death. In order to be serving a public agency in an official capacity one must be an officer, employee, volunteer, or similar relationship of performing services as a part of a public agency. To have such a relationship with a public agency, an individual must be officially recognized or designated as functionally within or a part of the public agency.

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private employer in an official capacity as an employee. Thus, even if the hearing officer were correct in determining that Mr. H. was serving as an employee of the State for Workmen's Compensation purposes, his "official capacity" remained that of an employee of the independent contract.

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1. On August 18, 1978, Joe H. died of injuries sustained when the aircraft he was piloting crashed.

2. The aircraft was owned by the California Division of Forestry and was providing air coordination of fire-

fighting activities at the time of the crash.

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6. The Hemet Valley Flying Service exercised primary control over the activities performed by its employee, Joe H., under the contract.

The basic conclusion of law that I have reached is that the decedent was not a "public safety officer" as this term is defined in thc Public Safety Officers' Benefits Act because he was not ""serving a public agency in an official capacity . . . as a law enforcement officer or as a fireman."

As a result of my review, and for the reasons set forth above, the final agency determination is that the claim

ant is not entitled to benefits under the public Safety Officer's Benefits Act of 1976 (Pub. L. 94-430, 90 Stat. 1346).*

The following additional findings of fact are adopted:

1. On August 18, 1978, Joe H. died of injuries sustained when the aircraft he was piloting crashed.

2. The aircraft was owned by the California Division of Forestry and was providing air coordination of fire-fighting activities at the time of the crash.

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As a result of my review, and for the reasons set forth above, the final agency determination is that the claimant is not entitled to benefits under the Public Safety Officer's benefits Act of 1976 (Pub. L. 94-430, 90 Stat. 1346).*

3

No. 07-460

In the Supreme Court of the United States

CHRISTINE WELLS GROFF AND MICHAEL WELLS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
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QUESTION PRESENTED

Whether the court of appeals correctly deferred to the Bureau of Justice Assistance's determination that the employee of an independent contractor was not "serving a public agency in an official capacity" within the meaning of the Public Safety Officers' Benefits Act of 1976, 42 U.S.C. 3796 *et seq.*, when he died performing the work required by his employer's government contract.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 493 F.3d 1343. The opinion of the United States Court of Federal Claims (Pet. App. 24a-78a) is reported at 72 Fed. Cl. 68.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 2007. The petition for a writ of certiorari was filed on October 1, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

1. The Public Safety Officers' Benefits Act of 1976 (PSOBA or Act), 42 U.S.C. 3796 *et seq.*, provides for the payment of a one-time, lump-sum benefit of $250,000

"[i]n any case in which the Bureau of Justice Assistance * * * determines, under regulations issued pursuant to [the Act], that a public safety officer has died as the direct and proximate result of a personal injury sustained in the line of duty." 42 U.S.C. 3796(a) (Supp. IV 2004). The PSOBA defines "public safety officer" as "an individual serving a public agency in an official capacity, with or without compensation, * * * as a firefighter." 42 U.S.C. 3796b(7)(A) (2000); 42 U.S.C. 3796b(8)(A) (Supp. IV 2004); Act of Jan. 5, 2006, Pub. L. No. 109-162, § 1164(a)(1), 119 Stat. 3120 (to be codified at 42 U.S.C. 3796b(9)(A) (2006)); accord 28 C.F.R. 32.2(j) (2001); cf. 28 C.F.R. 32.3 (2006) (defining "in an official capacity," effective September 11, 2006).

In the PSOBA Congress delegated authority to the Bureau of Justice Assistance (BJA) "to establish such rules, regulations, and procedures as may be necessary to carry out the purposes of" the Act. 42 U.S.C. 3796c(a). Pursuant to that statutory authority, the BJA has promulgated regulations establishing a process for reviewing benefits claims that includes a hearing before a hearing officer and a final determination by the Director of the BJA. See 28 C.F.R. 32.23-32.24 (2001) (current version at 28 C.F.R. 32.41-32.55); Pet. App. 8a-10a. In determining whether a public safety officer is entitled to a benefit, the BJA gives "substantial weight to the evidence and findings of fact presented by State, local, and Federal administrative and investigative agencies." 28 C.F.R. 32.5 (2001).

2. In 1995, San Joaquin Helicopters (SJH), a private company based in California, entered into a contract with the California Department of Forestry and Fire Protection (CDF) to provide piloting services for fire suppression missions. Pet. App. 4a, 94a. The contract

stated that SJH employees "shall act in an independent capacity and not as officers or employees or agents of the State of California." *Id.* at 94a. The contract also established that SJH would indemnify the State and maintain liability insurance for activities performed under the contract. *Id.* at 94a-95a. Additionally, SJH held sole authority to set the terms and conditions of employment for the pilots who performed services under the contract. *Id.* at 93a. A CDF aviation procedures handbook provided that "[c]ontractors * * * must understand that they are acting in an independent capacity in the performance of their service, and not as an officer, employee or agent of the state." *Id.* at 94a.

Beginning in 1997, Lawrence Groff was employed by SJH as an aircraft pilot. Pet. App. 4a, 93a. On August 27, 2001, an air-tanker that Groff was piloting on a fire-suppression mission pursuant to the contract with the CDF collided with another aircraft. *Id.* at 4a, 90a. Groff died as a result of injuries he sustained in the collision. *Id.* at 4a, 90a.

3. On August 21, 2002, petitioners—Groff's widow and stepson—filed a claim for death benefits pursuant to the PSOBA. Pet. App. 4a, 25a, 90a. On October 31, 2002, the BJA issued an initial determination denying the claim. *Id.* at 79a-80a, 87a-88a. The BJA explained that "[t]he death of a privately-employed worker who has been contracted by a public agency is not covered by the PSOB Act." *Id.* at 88a. In support of that proposition, the BJA cited *Holstine* v. *Department of Justice LEAA* (DOJ July 8, 1980), *in* Office of General Counsel, U.S. Dep't of Justice, *Legal Interpretations of the Public Safety Officers' Benefits Act* (*Legal Interpretations*) 7 (Nov. 1981), aff'd, 688 F.2d 846 (9th Cir. 1982) (Table), in which the BJA's predecessor agency decided

on highly analogous facts that the death of a pilot employed by a contractor to a public agency did not give rise to benefits under the Act. Pet. App. 88a. Petitioners appealed the initial denial of benefits to a BJA hearing officer. *Id.* at 79a.

After the BJA hearing officer made several offers during 2003 to arrange a formal hearing, petitioners elected to submit evidence and arguments by mail in January 2004. Pet. App. 79a-80a. Petitioners' primary evidence consisted of two letters written after Groff's death by a CDF official describing Groff's relationship to the state agency. *Id.* at 58a-60a. The letters noted that Groff was "authorized and required" to operate state firefighting aircraft and "to take immediate and independent action to suppress" fires. *Id.* at 59a. The letters also stated that the State of California and United States were the beneficiaries of Groff's services; that he operated a state aircraft at the direction of CDF dispatchers; that he received food, lodging, and flight gear from the CDF; that he "was the final authority and responsible for the safe operation" of the state aircraft; that he "had the authority, as a State firefighter pilot under the Federal Aviation Regulations, to close airspace to civil aircraft, to get priority handling from the Federal Aviation Administration on airspace use"; and that his death has been recognized on state and national firefighter memorials. *Id.* at 82a-83a.

On February 20, 2004, the hearing officer sustained the BJA's denial of benefits. The officer concluded that Groff was not a "public safety officer serving a public agency in an official capacity" under the Act because the contract between SJH and the CDF made clear that "Groff was serving as an employee of a private em-

ployer." Pet. App. 85a-86a. Petitioners appealed the hearing officer's determination to the BJA Director.

On July 20, 2005, the BJA Director issued the agency's final decision denying the claim. Pet. App. 90a-118a. The Director relied in part on the *Holstine* decision, which the BJA's predecessor agency had reported as official guidance in a publication, see *Legal Interpretations* 7, and to which the Federal Circuit deferred in *Chacon* v. *United States*, 48 F.3d 508 (1995). Pet. App. 96a-99a. The Director interpreted the Act's requirement that an individual "serv[e] a public agency in an official capacity" to mean that "the individual must be 'an officer, employee, volunteer or [be in a] similar relationship of performing services as part of a public agency'" and "be officially recognized or designated as functionally within or part of the public agency." *Id.* at 98a (quoting *Legal Interpretations* 9).

After thoroughly examining both the evidence that petitioners submitted and also evidence that the Director subpoenaed from SJH, see Pet. App. 92a, the Director concluded that "Groff was not functionally within or a part of the CDF; he ultimately served under the direction of his private-sector employer," *id.* at 99a. The Director based that conclusion on, *inter alia*, the SJH–CDF contract's statement that SJH employees acted "in an independent capacity and not as officers or employees or agents of the State"; SJH's agreement to hold the State harmless for services rendered; SJH's superior control over Groff and sole authority to set the terms and conditions of his employment; SJH's obligation to pay Groff's compensation and benefits; SJH's obligation to carry liability insurance to cover third-party claims; and SJH's agreement to pay penalties incurred with respect to pilots' unsatisfactory or nonperformance of

services. *Id.* at 101a-102a. The Director construed the requirements that CDF placed on pilots as permitting CDF to obtain predictable, safe, and effective services, but not as creating "State supervision of day-to-day operations of the contractor, so as to confer agency status or authorize the decedent to serve the CDF in an official capacity." *Id.* at 101a.

4. Petitioners subsequently filed a complaint in the Court of Federal Claims (CFC) seeking review of the agency's final decision. The CFC possesses jurisdiction to review BJA decisions to determine (1) whether there has been substantial compliance with statutory requirements and provisions of implementing regulations; (2) whether there has been any arbitrary or capricious action by government officials involved; and (3) whether substantial evidence supports the decision. *Chacon*, 48 F.3d at 511-512.

The CFC set aside the BJA's determination and awarded benefits. Pet. App. 24a-78a. The court accepted the BJA's interpretation that "[i]n order to be serving a public agency in an official capacity one must be an officer, employee, volunteer, or [in a] similar relationship" and "must be officially recognized or designated as functionally within or a part of the public agency." *Id.* at 30a (quoting *Legal Interpretations* 9); see *id.* at 39a. The CFC declined to defer, however, to the BJA's conclusion that privately employed firefighters fell outside that definition because, in the court's view, that conclusion was not supported by "the PSOBA's remedial purpose and legislative history." *Id.* at 51a. The CFC relied primarily on the two CDF letters to hold that "Groff was fully integrated into the CDF and was performing services as a part of the CDF much like a CDF employee." *Id.* at 61a. The court granted judg-

ment in favor of petitioners in the amount of $250,000, adjusted in accordance with 42 U.S.C. 3796(h) (Supp. IV 2004). Pet. App. 71a.

5. The court of appeals reversed. Pet. App. 1a-23a. The court first reaffirmed its precedents holding "that Congress intended for the BJA's statutory interpretations announced through adjudication to have the force of law, and that those interpretations are therefore entitled to deference under [*Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984) (*Chevron*)]." Pet. App. 13a; see *id.* at 13a-16a (citing *Amber-Messick* v. *United States*, 483 F.3d 1316, 1323 (Fed. Cir.), cert. denied, 128 S. Ct. 648 (2007); *Chacon*, 48 F.3d at 512).

The court of appeals then applied the two-step *Chevron* inquiry to sustain the BJA's conclusion that Groff was not a "public safety officer" under the Act. Pet. App. 16a-19a. The court held that the statute was "silent" as to "[t]he precise issue in this case," which "is whether the term 'public safety officer' as used in the statute includes privately employed pilots * * * who render fire suppression assistance pursuant to contracts between their employers and pubic agencies." *Id.* at 16a-17a. Proceeding to *Chevron*'s second step, the court affirmed the BJA's construction because it is reasonable "to conclude that Congress intended for the phrase 'in an official capacity' to capture" volunteer and public firefighters "while excluding privately employed individuals," and because the Act's legislative history was compatible with the BJA's construction. *Id.* at 18a-19a.

The court of appeals also rejected petitioners' contention that the BJA misapplied its own interpretation because Groff was "officially recognized or designated as functionally within or a part of" the CDF. Pet. App. 19a-20a. The court deferred to the BJA's contrary as-

sessment of the contractual arrangement between SJH and the CDF. *Ibid.*

ARGUMENT

The court of appeals properly applied well-established principles of *Chevron* deference to conclude that the BJA's interpretation of "public safety officer" for purposes of the PSOBA is permissible and entitled to deference. The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. In addition, petitioners' argument reduces to a disagreement with the BJA's assessment of the factbound details of Groff's particular relationship with the state agency. For those reasons, further review is unwarranted.

1. The court of appeals correctly applied settled principles of *Chevron* deference to sustain the BJA's conclusion that employees of a private company contracting with the government do not "serv[e] a public agency in an official capacity" within the meaning of the PSOBA.

a. An agency's legal interpretation is eligible for *Chevron* deference "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001). The legal interpretation at issue in this case satisfies those conditions because the BJA possesses congressionally delegated authority to adjudicate claims and promulgate rules with legal force, see 42 U.S.C. 3796c(a), and issued the interpretation through a "relatively formal adjudicative procedure," *Mead*, 533 U.S. at 230. Those procedures included the right to a full evidentiary hearing before a hearing ex-

aminer, who made written findings of fact and conclusions of law, as well as plenary review by the head of the agency, who issued a final written decision. 28 C.F.R. 32.23-32.24 (2001). The CFC reviews the BJA's decision deferentially based on the agency record, see *Yanco* v. *United States*, 258 F.3d 1356, 1362, 1365 (Fed. Cir. 2001), cert. denied, 534 U.S. 1114 (2002), and the BJA treats at least some of its final decisions as precedents for future cases, see *Chacon* v. *United States*, 48 F.3d 508, 512 (Fed. Cir. 1995). Under this Court's precedents, those factors confirm the legal force of an agency's interpretations and, concomitantly, the applicability of *Chevron*'s framework. See, *e.g.*, *Mead*, 533 U.S. at 232-233 & n.16.

Contrary to petitioners' assertion (Pet. 24), the BJA's decision is not ineligible for *Chevron* deference merely because it was not issued in a regulation. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (granting *Chevron* deference to determinations made through adjudication by Board of Immigration Appeals). Nor does the BJA's choice to determine claim eligibility through adjudication rather than rulemaking render the interpretation "beyond the mandate issued by Congress," as petitioner contends (Pet. 24). Congress has authorized the BJA to establish "rules" or "procedures" to enforce the Act, see 42 U.S.C. 3796c(a), and the choice of enforcement mode lies within the BJA's discretion. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202-203 (1947). It is therefore unsurprising that the Federal Circuit has long applied *Chevron* analysis to legal interpretations that the BJA renders through adjudication. *Amber-Messick* v. *United States*, 483 F.3d 1316, 1323 (Fed. Cir.), cert. denied, 128 S. Ct. 648 (2007); *Chacon*, 48 F.3d at 511-512.

Petitioners also err in arguing (Pet. 17-19, 23-25) that the BJA's decision is not eligible for *Chevron* deference because it relied on the *Holstine* decision as reported in the *Legal Interpretations*. Assuming *arguendo* that the *Legal Interpretations* would not, standing alone, command *Chevron* deference, that fact would "not automatically deprive that interpretation of the judicial deference" it now merits. *Barnhart* v. *Walton*, 535 U.S. 212, 221 (2002). To the contrary, the fact that the BJA has long construed the Act in a consistent manner supports the conclusion "that *Chevron* provides the appropriate legal lens" through which to view the BJA's interpretation. *Id.* at 222.

Petitioners attempt to limit the applicability of *Chevron* deference (Pet. 23-25) by distinguishing between, on one hand, the BJA's "definition" of who "serv[es] a public agency in an official capacity," and, on the other, the BJA's legal conclusion that a privately employed firefighter does not fall within the "definition." That distinction does not withstand scrutiny. The BJA's legal conclusion constitutes an interpretation of the statute, made through an exercise of the agency's congressionally delegated authority, just as much as the so-called "definition"; *Chevron*'s framework therefore applies to both. Cf. *Aguirre-Aguirre*, 526 U.S. at 429-430 (deferring under *Chevron* to Bureau of Immigration Appeals' ultimate conclusion that respondent had committed a serious nonpolitical crime). As the court of appeals explained, the BJA's "definition" "was an explicit restatement" of the agency's primary conclusion that "privately employed contract pilots did not serve public agencies in an official capacity." Pet. App. 21a (internal quotation marks omitted). Thus, the BJA's decision presents a

single legal conclusion, which the court of appeals correctly held was *Chevron*-eligible.

b. Petitioners do not seriously dispute the court of appeals' holding that the Act is "silent" as to "whether the term 'public safety officer' as used in the statute includes privately employed pilots * * * who render fire suppression assistance pursuant to contracts between their employers and pubic agencies." Pet. App. 16a-17a. Although petitioners assert (Pet. 28-29) that the "common sense" reading of the Act covers a privately employed firefighter, the phrase "in an official capacity" limits the clause "serving a public agency" and suggests that only persons in an official *public* position are covered by the Act. The BJA's view that persons employed by a *private* employer are not covered is therefore a persuasive reading of the Act. At most, petitioners' construction of the statute (Pet. 28-29) demonstrates only that the phrase "serving a public agency in an official capacity" is ambiguous with respect to the question at hand. Accordingly, the court of appeals properly proceeded to *Chevron*'s deferential second step.

c. The court of appeals correctly decided that the BJA's legal conclusion reflects a permissible construction of the PSOBA and is therefore deserving of deference. In addition to its consonance with the text, purpose, and legislative history of the statute, the BJA's interpretation also deserves deference because it has been consistently applied since 1980. See *Barnhart*, 535 U.S. at 220 ("[T]his Court will normally accord particular deference to an agency interpretation of 'longstanding' duration.") (quoting *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 522 n.12 (1982)).

Petitioners contend (Pet. 11-13) that BJA's interpretation is impermissible in light of the Act's purposes of encouraging and recognizing public service and alleviating burdens placed on public servants and their families. But "no legislation pursues its purposes at all costs," *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam), and petitioners' general statements of legislative purpose therefore shed little if any light on the question of precisely whose death gives rise to a death benefit. Moreover, petitioners' contention disregards the fact that the Act provides "a limited program" that balances "compensating for inadequate state and local death benefits" with federal budgetary constraints and concerns that "federal assumption of full responsibility for compensating the families of deceased officers" would "allow states and municipalities to evade their responsibilities." *Russell* v. *LEAA*, 637 F.2d 1255, 1261 (9th Cir. 1980). That the Act confers death benefits in order to supplement payments by States and municipalities indicates that the Act does not cover privately employed individuals whose death benefits typically are paid by their private employers.

Nor does the PSOBA's legislative history contradict the BJA's interpretation. In protracted discussions of the Act's history, neither petitioners (Pet. 29-33) nor the CFC (Pet. App. 41a-51a) identify any evidence that affirmatively supports their contention that Congress meant to provide benefits for employees of private companies. The only legislative history that specifically addresses whether the Act covers private-sector employees, a floor exchange between the PSOBA's House sponsor and another Representative, points in the opposite direction. See 122 Cong. Rec. 12,009 (1976) (statements of Rep. Myers and Rep. Eilberg) (Rep. Myers: "[I]s there any

way in which this bill would apply to privately employed safety or security officers?" Rep. Eilberg: "No, it would not."); Pet. App. 111a. Like petitioners' summary of the Act's purposes, petitioners' summary (Pet. 32) of the legislative history as revealing a "generous impulse and broadening application of the PSOBA" is too generalized to bear on the question at hand, let alone to show that the BJA's conclusion is unreasonable.

Also demonstrating the permissibility of the BJA's interpretation is the current version of the PSOBA's implementing regulations. The current regulations, which the BJA promulgated in August 2006 after notice and comment, codify the BJA's longstanding view that privately employed firefighters such as Groff do not "serv[e] a public agency in an official capacity." See 28 C.F.R. 32.3.* Although the government did not rely on the current regulations as the basis for defending the BJA's decision before the lower courts, Pet. App. 22a-23a n.2, this Court has given deference to an "agency's current authoritative pronouncement of what the statute means." *Smiley* v. *Citibank, N.A.*, 517 U.S. 735, 744 n.3 (1996); see *United States* v. *Morton*, 467 U.S. 822, 835-836 n.21 (1984) (deferring to regulation promulgated after suit was initiated because suit raised issue for which Congress delegated authority to agency to ad-

* The current regulations state: "An individual serves a public agency in an official capacity only if (1) He is officially authorized, recognized, or designated (by such agency) as functionally within or part of it; and (2) His acts and omissions, while so serving, are legally those of such agency, which legally recognizes them as such (or, at a minimum, does not deny (or has not denied) them to be such)." 28 C.F.R. 32.3. That standard excludes Groff because the CDF's contract with SJH stated that Groff was not part of the agency, but instead "act[ed] in an independent capacity," and because his acts and omissions were not legally those of the CDF. Pet. App. 94a.

dress). In sum, because the court of appeals applied settled precedent to defer to the BJA's permissible interpretation, further review is unnecessary.

2. At bottom, petitioners accept the BJA's view that persons serving as employees of a private contractor rather than as part of a public agency are not covered by the Act. See Pet. 21 (defending the BJA's "definition" of "serving * * * in an official capacity"); Pet. 24 (same); Pet. 33-34 (same). Their argument therefore reduces to a disagreement with the BJA's characterization of the particular relationships between Groff, SJH, and the CDF. That factbound argument does not merit this Court's review. See Sup. Ct. R. 10; *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

In any event, the record contains substantial evidence that Groff was not serving the CDF in an official capacity. The contract between SJH and the State provided that SJH employees "shall act in an independent capacity and not as officers * * * or agents of the State of California." Pet. App. 94a. The CDF's aviation handbook confirmed Groff's "independent capacity" status, providing that "[c]ontractors must understand that they are acting in an independent capacity in the performance of their service, and not as an officer * * * or agent of the state." *Id.* at 4a. SJH agreed to hold the State harmless for any actions of Groff. *Id.* at 94a. Similarly, SJH, not its employees, were liable to the CDF for financial penalties and the training costs related to pilots whose qualifications or performance fell below specified standards. *Id.* at 95a. Sole authority to determine the terms and conditions of Groff's employment, such as compensation, hours and schedule, work assign-

ments, and job responsibilities, rested with SJH, not the CDF. *Id.* at 93a. Thus, while the State and the public benefitted from Groff's piloting activities, abundant evidence supports the BJA's conclusion that he served as part of SJH.

Finally, petitioners are mistaken in contending (Pet. 27) that the BJA violated its obligation under 28 C.F.R. 32.5 to give substantial weight to the factual findings of the CDF. The BJA acknowledged and did not dispute the CDF's factual findings that were presented by petitioners. See Pet. App. 101a. The BJA simply disagreed with the legal conclusion that petitioners urged on the basis of those facts. "Although the Bureau could give the [CDF's] legal conclusion whatever weight, if any, it deemed appropriate, it was not required to give it any weight." *Demutiis* v. *United States*, 291 F.3d 1373, 1379 (Fed. Cir. 2002).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

CHRISTINE WELLS GROFF
and MICHAEL WELLS,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The sweeping concessions in Respondent's Brief, and the invocation of an argument expressly rejected by Respondent in the United States Court of Appeals for the Federal Circuit, bring in to sharp relief the need for this Court to grant the Petition for a Writ of Certiorari.

Congress intended that the one-time death benefit under the Public Safety Officers' Benefits Act of 1976, 42 U.S.C. §§ 3796 *et seq.* ("PSOBA") compensate the families of law enforcement personnel and firefighters who die in the line of duty. Congress wished to pay a debt of gratitude. It was also designed to improve morale, aid recruitment and to provide recognition. (Petitioners' Appendix Page ("App. p.") 41a-51a.)

Petitioners are before this Court because the Bureau of Justice Assistance ("BJA") has imposed a per se exclusion to this remedial benefit, denying benefits arising out of the death of an aerial firefighter, such as Mr. Groff, Petitioners' husband and step-father. The national and state agencies operate their aerial firefighting wings through contracts with third parties. As the California Department of Forestry and Fire Protection ("CDF") attested in this case, this is merely a conduit for the paycheck: in all other respects, the aerial firefighters are under the direct control and supervision of the agencies, as the uncontested facts in this case show.

As the Respondent's Brief highlights, the BJA per se exclusion is inconsistent with the statutory mandate, frustrates the policy that Congress sought to implement, conflicts with Congress's express intent, and is arbitrary.

1. Respondent admits all the facts exhibiting the pervasive control and substantial supervision by the CDF over the day-to-day activities of Mr. Groff, the aerial firefighter killed while fighting a fire as part of CDF. This level of control establishes that Mr. Groff was serving in an official capacity, recognized and designated as part of the CDF.

2. Respondent now raises the 2006 Revisions to the Regulations at 28 C.F.R. § 32.3 (2006) relating to the PSOBA. Respondent did not raise the 2006 Revisions in its briefing below, and, as the United States Court of Appeals for the Federal Circuit noted, Respondent expressly declined to rely on these revisions at oral argument (App. p. 22a-22b.) Petitioners believe that Petitioners' claim should be granted even if the Court considers the 2006 Revisions.

3. Respondent concedes that the United States Court of Appeals for the Federal Circuit impermissibly changed the expression of Congress's legislative intent (that Congress wanted to ensure that "professional firefighters" were covered by the PSOBA) by misquoting its prior decision in *Amber-Messick v. United States*, 483 F.3d 1316 (Fed. Cir. 2007). In *Amber-Messick*, the Federal Circuit Court of Appeals determined that Congress wanted to **ensure** that

"professional firefighters" were included within the coverage of PSOBA citing H.R. Rep. No. 94-1031, at 4 (1976) ("The bill defines 'firemen' to include volunteer as well as professional firemen."). *Amber-Messick*, 483 F.3d at 1324. In its decision in this case to exclude PSOBA coverage, the Federal Circuit Court of Appeals changed the statement of Congressional intent: "As we observed in *Amber-Messick*, the drafters of the PSOBA were concerned with ensuring that both volunteer and public employee firefighters were included with the scope of the Act." (App. p. 18a.) This change to "public employee" from "professional firefighter" is contrary to the Congressional record, which as originally quoted in *Amber-Messick* was to ensure that "professional firefighters", not just "public employee firefighters" were included within the scope of the PSOBA. The Congressional intent cited in *Amber-Messick* supports the award of the PSOBA benefit to Petitioners.

A. The Aerial Firefighters Serve In An Official Capacity

Contrary to Respondent's assertion, Petitioners are not before this Court to dispute facts. There is no dispute of facts, as Respondent's Brief makes clear. What is at issue is Respondent's refusal to acknowledge that the overwhelming and uncontested facts demonstrate that Mr. Groff was serving the CDF (a public agency) in an official capacity at the time he died in the line of duty. This is so whether under the

plain language of the PSOBA, 42 U.S.C. § 3796(a), or under the so-called *Holstine* test:

> In order to be serving a public agency in an official capacity one must be an officer, employee, volunteer, or similar relationship of performing services as a part of a public agency. To have such a relationship with a public agency, an individual must be officially recognized or designated as functionally within or a part of the public agency.

Petitioners are not disputing facts. Petitioners set forth extensive uncontested facts that establish the relationship necessary in order that they, the survivors of a firefighter killed in the line of duty while serving a public agency in an official capacity, are entitled to the one-time death benefit under the PSOBA. Yes: the establishment of the relationship is factual. This is in accordance with a fundamental principle of our legal system: *ex facto jus oritur* (the law springs or ought to spring from the facts). *See*, *Adams v. Tanner*, 244 U.S. 590, 600, 37 S. Ct. 662, 61 L. Ed. 1336 (1917) (Brandeis, J., dissenting) ("*Ex facto jus oritur*. That ancient rule must prevail in order that we may have a system of living law"); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984).

The facts demonstrate that Mr. Groff was fully integrated into the firefighting services of the CDF as a firefighter. Respondent does not dispute these facts, and is mandated to give them substantial weight as the BJA reviews a PSOBA claim. 28 C.F.R. § 32.5

(2001). *Demutiis v. United States*, 291 F.3d 1373, 1379 (Fed. Cir. 2002).

- At the time of his death, Mr. Groff was the pilot of an airtanker delivering fire retardant as part of a CDF fire fighting operation.
- Both airtankers in the collision were owned by the CDF and were operated under the control and direction of the CDF for public use fire suppression and were being operated solely for the purposes of state business.
- During firefighting operations, contract pilots such as Mr. Groff were supervised by a CDF air tactical group supervisor who would "ordinarily fly in an orbit above the level of the airtankers and . . . describe targets to the airtanker and helicopter pilots."
- The CDF dispatched the planes flown by pilots such as Mr. Groff. The CDF designates at which CDF air attack bases the pilots are based, and the pilots fly the planes as ordered by the CDF.
- Contract CDF pilots wear CDF uniforms as specified by the CDF.
- Contractor pilots were required to participate in CDF debriefings (critiques of missions) and were evaluated by CDF personnel.
- Contract CDF pilots had CDF credit cards for refueling CDF planes.
- Contract CDF pilots were interagency carded, which meant that the pilots were authorized

to operate a State airtanker and to participate in mutual aid responses to federal agency fires.

- Contract CDF pilots have the authority as a State firefighter pilot to close airspace to civil aircraft, to get priority handling from the FAA on airspace use, and to give orders as necessary to suppress wildland fires, as a state firefighter.
- On the day of his death, Mr. Groff was performing services under the supervision of a CDF air tactical group supervisor, a battalion chief, flying above his airtanker.
- The CDF attested that the "employer [under the state contract] was merely a conduit to provide pay to our [CDF] pilot."
- The CDF also sets pilot standards, must approve the hiring of each pilot, train the pilots, check ride and finally card the pilots for State duty. The sole function of the contractor was/is to provide a means of paying the pilots and maintenance technicians.
- The National Transportation Safety Board found that the CDF was operating the CDF airtanker for "public-use fire suppression flights."
- The CDF attested that in its opinion Mr. Groff was "serving as an officially recognized and designated member of the CDF."
- The State of California submitted the PSOB death benefit application relating to Mr.

> Groff's death because Mr. Groff was the Pilot-in-Command of a State Airtanker responding to a State wildland fire.

Respondent does not contest that the airtankers and their pilots are an integral part of firefighting capabilities and operations, especially in the ever-increasing wildland-urban interface ("WUI"). These areas are increasingly susceptible to large fires, as the WUI grows exponentially (this is where most development is built). Respondent does not contest that climate conditions such as global warming are producing long fire seasons, and, according to the Federal Bureau of Investigation, there is a real threat of domestic terrorism through large scale arson.

As pending Amici Curiae Associated Airtanker Pilots and Aerial Firefighters and California Department of Forestry and Fire Protection describe in their proposed brief submitted to this Court:

> The pilots working for the public agencies under contract through the third party providers serve these agencies in an official capacity. The differences between a CDF helicopter pilot and an airtanker pilot is the piece of equipment and where the paycheck comes from. Both fly under CDF rules and are directed by CDF personnel. For instance, a CDF contract air tanker pilot completes the same pilot application form as a CDF helicopter pilot. The Interagency Card is also the same. This Interagency Card gives the holder the right to fly a plane, or helicopter as the case may be, for the CDF or USFS,

and also allows the pilot to operate as a firefighter and take control of fire scenes. It also gives the pilot the responsibility of initial attack on a fire, and is entrusted with the public safety to act as initial attack. The Interagency Card holder can close down airspace and state and federal highways if they see these actions as necessary. The Interagency Card is issued by the agency, CDF or USFS, not the contractor. The Interagency Card entitles the pilot to operate on fires on private and public lands, whether federal or state, and under the interagency agreements. The holder operates as and is a State fire officer, and acts as a pilot-in-command of a fire scene. In the recent Presidential visit to Southern California during the fires, the Interagency Card holder firefighters were the only aircraft permitted to fly in the temporary no fly area created for the President.

The pilots perform an official function, flying a public aircraft as part of the public firefighting force to put out a fire threatening state owned property, people's lives and private homes. In the case of CDF pilots, they are stationed at CDF air attack bases, fly CDF planes as ordered by CDF controllers. They drop fire retardant under CDF direction while fighting a fire as part of the overall CDF incident response effort where their actions are integrated with all other CDF units on the ground and in the air. They have the authority as a State firefighter pilot under the Federal Aviation Regulations to close airspace to civil aircraft, to get priority

> handling from the FAA on airspace use, and to give orders as necessary to suppress wildland fires. Except for the way they are provided their paycheck, there is no difference between them and a direct CDF employee.

The uncontested facts manifest that Mr. Groff was in a similar relationship of performing services as a part of a public agency as that of an employee and was "officially recognized or designated as functionally within or a part of the public agency."

B. The Per Se Exclusion Is Arbitrary and Contrary To The Policy Of The Statute

Instead of looking at the true relationship as established by the uncontested facts, Respondent relies on the contract between the CDF and the third party contracting entity. (It is significant that the same pilots fly for the governmental entity no matter which third party is the current holder of the contract.) This is the basis for the Per Se Exclusion of the aerial firefighters: If there is a contract with a third party, there is no coverage for the aerial firefighters. Respondent claims that this per se exclusion, based on this faulty and myopic analysis is entitled to deference under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843-44, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) ("*Chevron*").

Respondent puts form over substance and ignores its own stated standard. Focusing on the existence and form of the contract between the state agency

and the "employer" begs the question. a. The statute is broader than employment. b. The facts demonstrate a pervasive relationship between Mr. Groff and CDF, akin to that of direct employment. [App. P. 64a-65a; 70a-71a]; *LaBare v. United States* (2006) 72 Fed. Cl. 111, 124 (Ct. Cl. 2006) "pervasive relationship between the State and Mr. Groff.")

The adhesion to the existence of a contract with a third party provider is the sole root of the Per Se Exclusion by the BJA of the so-called contract aerial firefighters from the scope of the PSOBA. Its genesis was fully discussed in Petitioners' Opening Brief. [Opening Brief, pp. 16-21.]: This per se exclusion is arbitrary and capricious. It is unlike any test, state or federal, relating to the determination of a relationship such as employment status. For instance, whether under state employment law, or federal employment law, the provisions of a contract alone do not govern. The true nature of the relationship is what controls, of which the contract is only a part of the analysis. For instance, under California state employment law, the most important factor is the principal's right to control, and actual control of the manner and means of accomplishing a desired result, and this test should be applied with deference to the protective legislation. *S.G. Borello & Sons, Inc. v. Dept. of Indus. Relations*, 48 Cal. 3d 341, 353, 256 Cal. Rptr. 54, 769 P.2d 399 (Cal. 1989). The federal standard is similar: the right to control the manner and means. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323, 112 S. Ct. 1344, 117 L. Ed. 2d 581

(1992). Whatever the test employed, it is not solely determined by the contract at hand.[1]

Petitioner basically maintains that because the BJA has repeated its per se exclusion over and over again, it is entitled to *Chevron* deference. Multiple wrongs do not make a right, nor are they entitled to *Chevron* deference. (*See*, Petitioners' Opening Brief, pp. 23-27.) This policy cannot be allowed to continue. It arbitrarily excludes a significant part of the national firefighting force from being awarded the support, gratitude and recognition intended by Congress. The

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[1] Even if the 2006 Revisions, C.F.R. § 32.3 (2006), are considered by this Court, despite Respondent's prior express rejection of reliance on them, Petitioners maintain that their claim would be granted in light of the facts established.

The 2006 Revisions, at C.F.R. § 32.3, define "Official Capacity" as

> An individual serves a public agency in an official capacity only if –
>
> (1) He is officially authorized, recognized or designated (by such agency) as functionally within or part of it; and
>
> (2) His acts and omissions, while so serving, are legally those of such agency, which legally recognizes them as such (or at a minimum, does not deny (or has not denied) them to be such.)

The uncontested facts are replete with the recognition by the CDF that it recognized Mr. Groff as functionally part of the CDF and Mr. Groff's actions as its own, and that it does not deny them. Under the totality of the facts, including the contract, it is clear that the relationship between CDF and Mr. Groff was one in which he was serving in an official capacity, and CDF recognized his actions as those of the CDF.

per se exclusion contradicts the very purposes of the PSOBA:

- To assist in the recruitment and retention of qualified public safety officers.
- To establish the value that communities place on contributions from those who are willing to serve their communities during potentially dangerous circumstances.
- To offer peace of mind to men and women who are seeking careers in public safety.

This is a national issue, and the aerial firefighters are part of the national fire response. National Interagency Fire Center, *Interagency Standards for Fire and Aviation Operations* ("*Interagency Standards*"), Chapter 17, Aviation Operations/Resources, Purpose and Scope, page 17-1. *See*, Testimony of James B. Hull, President, National Association of State Foresters Before the Senate Committee on Energy and National Resources Subcommittee on Public Lands and Forests, February 15, 2006. As a matter of national policy, air tankers are a national resource. *Interagency Standards*, Chapter 17, Aviation Operations/Resources, Airtankers, page 17-9. This is even though they are obtained through contract. 2007 National Airtanker Service Contract, C.1.1(c), Objectives, page 7: "Airtankers awarded under this contract are considered national resources." This is not the time to damage further the morale and recruiting efforts of this critical arm of national firefighting efforts.

The BJA policy is capricious. For instance, if a CDF airtanker collided with a CDF helicopter during a fire suppression operation, killing the pilots of both aircraft, the airtanker pilot's family would be denied benefits while the helicopter pilot's family would be granted benefits: the helicopter pilots are employed directly by CDF while the airtanker pilots are employed through the contract. Both are in aircraft owned by the same agency, wearing the same uniforms, under common control, both recognized as and with the authority of state firefighters. The BJA's policy is arbitrary, unreasonable and contrary to the policy expressed in the statute.

In sum, removing the BJA's per se exclusion would enhance the purposes of PSOBA. It would aid recruitment, enhance morale and provide some security for the families. *Davis v. United States*, 50 Fed. Cl. 192, 208 (Ct. Cl. 2001.)

CONCLUSION

A Writ of Certiorari should be granted to address this significant legal and public issue.

Dated: January 14, 2008.

Respectfully submitted,

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Christine Wells Groff
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No. 07-460

In The
Supreme Court of the United States

CHRISTINE WELLS GROFF
and MICHAEL WELLS,

Petitioners,

v.

UNITED STATES,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit**

MOTION OF ASSOCIATED AIR TANKER PILOTS AND AERIAL FIREFIGHTERS AND CALIFORNIA FIRE PILOTS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND BRIEF OF AMICI CURIAE ASSOCIATED AIR TANKER PILOTS AND AERIAL FIREFIGHTERS AND CALIFORNIA FIRE PILOTS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION OF ASSOCIATED AIR TANKER PILOTS AND AERIAL FIREFIGHTERS AND CALIFORNIA FIRE PILOTS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Associated Air Tanker Pilots and Aerial Firefighters ("AAP") and California Fire Pilots Association ("CFPA") respectfully move this Court for leave to file the accompanying brief amici curiae in support of the Petition for a Writ of Certiorari submitted by Petitioners Christine Wells Groff and Michael Wells, the wife and stepson of the deceased air tanker firefighter, Larry Groff.

Counsel for Petitioners has consented to the filing of this brief. There has been no response from counsel for Respondent at this time, and this motion is being made out of an abundance of caution since it is presumed likely that Respondent will not agree to the filing of this brief.

The interest of AAP and CFPA in this case is immediate. AAP and CFPA represent aerial firefighters who serve under contract with the California Department of Forestry and Fire Protection ("CDF") and under the United States Department of Agriculture Forest Service National Airtanker Service Contract. If one of these firefighters is killed in the line of duty, the Department of Justice Bureau of Justice Assistance ("BJA") has taken the position that the families of the deceased pilots are *not* entitled to the federal death benefit provided under the Public

Safety Officers' Benefits Act of 1976, 42 U.S.C. § 3796(a) ("PSOBA"). The BJA maintains that they are not entitled to the benefit because the pilots are working through a contract with a third party.

Since 1980, about 87 professional firefighter pilots have been killed in the line of duty. The BJA, the administering agency, systematically denies PSOBA benefits in these instances.

For budgetary reasons, and the root of the BJA exclusion, national agencies decided not to maintain these fleets of aircraft nor their pilots and crew. Instead, they decided to contract these responsibilities to private industry for the duration of each fire season. CDF owns its planes.

The BJA's exclusion of aerial firefighters employed through a contract with a third party from PSOBA benefits is arbitrary and capricious. It contradicts the language of the statute and BJA's own reading of the statute. It also contradicts the very statutory purposes of the legislation.

The aerial firefighters are recognized as being part of the firefighting agencies and function as part of the agencies. The proposed brief examines the role of the airtanker pilots in firefighting and in the agencies, and demonstrates how BJA's position is contrary to the intent behind the PSOBA benefit, to provide recognition to the firefighters, support to the families, and to assist in recruitment.

As dramatically demonstrated in the recent Southern California fires, the role of the air tanker pilots is critical in modern firefighting. Moreover, when the President of the United States visited the fires last week, the air tanker pilots were permitted to operate and fly in the no-fly zone surrounding the Presidential party. This is in graphic contradistinction to the BJA's position that the pilots do not "serve . . . in an official capacity." The aerial firefighters function as an integral part of the firefighting force, yet the BJA refuses to acknowledge this, myopically focusing on the employment contract when the statute is broader, encompassing "service", which BJA concedes extends beyond employment. These pilots serve in an official capacity and when they die in the line of duty, their families are entitled to the PSOBA benefit being denied them by the BJA.

The foregoing considered, AAP and CFPA request that this motion be granted.

Dated: October 31, 2007 Respectfully submitted,

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QUESTION PRESENTED

1. Whether the families of professional firefighters killed in the line of duty and serving a public agency through a contract with a third party provider should be denied the federal death benefit provided under the Public Safety Officers' Benefits Act of 1976, 42 U.S.C. § 3796(a) ("PSOBA") based on a blanket per se exclusion created by the Department of Justice Bureau of Justice Assistance ("BJA") (that they are not entitled to the benefit because they are working through a contract with a third party) which is contrary to Congress's legislative intent, BJA's regulations and BJA's own interpretation of the statute?

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INTERESTS OF AMICI CURIAE[1]

Associated Airtanker Pilots and Aerial Firefighters ("AAP") is a non-profit organization whose mission is to provide a safe and efficient working environment for personnel involved with aerial fire suppression, whether on federal or state contracts. Its members include pilots under the California Department of Forestry and Fire Protection ("CDF") contract for airtanker pilots as well as the pilots under the United States Department of Agriculture Forest Service National Airtanker Service Contract.

California Fire Pilots Association ("CFPA") is a non-profit organization whose goal is to promote a safe and fair work place for pilots working under the CDF contract focusing on issues such as safety, pay, benefits and the work environment. The CFPA's membership includes 100% of the airtanker and air tactical pilots working under the CDF contract.

Amici have a common interest in this case: they represent the contract aerial professional firefighters whose families are being denied, and will be denied PSOBA benefits by the BJA if the Court permits the current BJA exclusionary policy to stand.

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[1] Counsel of record for all parties received notice of the intention to file this brief seven days before Respondent's opposition brief is due. Counsel for Petitioners have granted consent, and the response of Respondent is pending. Counsel for Petitioners assisted in authoring parts of this brief. No one other than Amici Curiae made any monetary contribution intended to fund the preparation or submission of the brief.

ARGUMENT

A. THE PER SE EXCLUSION OF AERIAL CONTRACT FIREFIGHTERS UNDERMINES THE VERY PURPOSE OF PSOBA

The PSOBA provides for the award of benefits, and a one time death benefit, to firefighters injured or killed in the line of duty serving a public agency in an official capacity. The BJA, the administering agency, has created a per se exclusion of pilots technically employed by the agency through a contract with a third party. The BJA uniformly denies PSOBA benefits in these instances. Since 1980, about 87 professional firefighter pilots have been killed in the line of duty.

The BJA's exclusion of aerial firefighters employed through a contract with a third party from PSOBA benefits is arbitrary and capricious. It contradicts the language of the statute and BJA's own reading of the statute. It also contradicts the very statutory purposes of the legislation.

The typical fire season lasts only six months each year. For budgetary reasons, and the root of the BJA exclusion, national agencies decided not to purchase, operate, and maintain these fleets of aircraft nor their pilots and crew. Instead, they decided to contract these responsibilities to private industry for the duration of each fire season. The principal national contractor is the USFS and most States obtain the aerial firefighting support they need from the USFS. On the other hand, CDF does own, maintain and

support its firefighting and observation planes, although it also obtains the professional pilot services though a contractor. The CDF supplies the planes under its contract, while the contractor supplies the plane under the national contract.

These aircraft, and their pilots, are an integral part of wildland fire incident response operations by public agencies. Retardant drops are typically used to slow the expansion of a fire, i.e., to contain or channel it, rather than put it out. These air activities are closely coordinated with the ground strike teams and controlled by the incident commander. The public agency requesting airtanker support has total tactical control over air operations at a fire site. Aerial fire fighting crews under the contracts do the same kind of work as non-contract employees, yet they are denied benefits by the BJA. They do the same kind of work and take the same risks as other fire crews, yet they are denied the benefits of PSOBA, not by statute but because of the BJA exclusionary policy.

The BJA policy is obviously capricious. For instance, a CDF air tactical or observation aircraft has two occupants, a pilot (who is employed through the contract) and a spotter (who is a CDF employee). If that air tactical plane crashed and its occupants were killed while giving directions to the airtankers dropping suppressant on a fire, the family of the CDF employee acting as spotter would be granted the PSOBA death benefit by the BJA, but the pilot's family would be denied it. Similarly, if an airtanker collided with a helicopter killing the pilots of both

aircraft, the airtanker pilot's family would be denied benefits while the helicopter pilot's family would be granted benefits (helicopter pilots are employed directly by CDF since these aircraft can be used during the "off season" for non-firefighting purposes).

Permitting this BJA per se exclusion to persist will have the opposite effect of the statutory purposes articulated by Congress for the death benefit under the PSOBA of increasing morale of fire departments, assisting in recruiting efforts, showing appreciation for public service personnel, and alleviating economic and emotional burdens on the families of the deceased public safety officers, including professional firefighters.

Air Tanker Pilots Are Integral to National Firefighting

Air tanker pilots are an integral part of firefighting tactics throughout the country, not just in the wildlands or the western United States. As James B. Hull, President, National Association of State Foresters ("NASF") testified before the Senate Committee on Energy and National Resources Subcommittee on Public Lands and Forests, February 15, 2006:

> Aerial firefighting resources are essential to the fire protection programs of most states and territories represented by NASF. Over two-thirds of the forests in the United States are in state and private ownerships.

> Fire protection in America is neither uniquely a western states' event nor is it confined predominately to federal lands. More than 80,000 wildfires occur annually across our nation. Well over 60% of those occur in non-western states and over 75% occur on non-federal lands. The key point, however, is that no single entity, including federal, state, or local government, has the capacity to handle all responses to wildfires within their jurisdictional area of responsibility. All fire protection programs are thus, by necessity, strategically integrated to most effectively and economically serve all rural lands of the nation. Aerial firefighting resources are utilized in exactly the same way; in other words, we are all in this together. Therefore, at this time it is critical that we all work together, federal and state, in developing an interagency, long-term strategy for our nation's aerial firefighting resources. We need a strategy that will provide a diverse fleet of helicopters and fixed-wing aircraft that will meet the needs of our wildfire suppression mission, and do so in a safe and airworthy and sustainable manner over the long-term. (www.stateforesters.com/testimony/2.15.06)

The aircraft and their pilots are an integral part of national and CDF firefighting capabilities and operations, and are just one part of the integrated forces used. "Aviation resources are one of a number of tools available to accomplish fire related land management objectives." National Interagency Fire Center, *Interagency Standards for Fire and Aviation*

Operations 2007 ("*Interagency Standards*"), Chapter 17, Aviation Operations/Resources, Purpose and Scope, page 17-1. As the *Interagency Standards*, at Chapter 1, at 01-5, graphically summarize the complexity of fire and the response to it:

> The Nature of Fire Operations
>
> Fire is a complex, dynamic, and often unpredictable phenomenon. Fire operations require mobilizing a complex organization that includes management, command, support, and firefighting personnel, as well as aircraft, vehicles, machinery and communications equipment. While the magnitude and complexity of the fire itself, and of the human response to it, will vary, the fact that fire operations are inherently dangerous will never change. A firefighter utilizing the best available science, equipment, and training, and working within the scope of agency doctrine and policy, can still suffer serious injury or death.

As a matter of national policy, air tankers are a national resource. *Interagency Standards*, Chapter 17, Aviation Operations/Resources, Airtankers, page 17-9. This is even though they are obtained through contract. 2007 National Airtanker Service Contract, C.1.1(c), Objectives, page 7: "Airtankers awarded under this contract are considered national resources."

In the context of PSOBA benefits, the logic is devastating. The plane under contract is a national

resource, but, according to the BJA, the family of the contracted pilot killed flying that plane while fighting a fire threatening people, public and private property is not entitled to the PSOBA benefit.

Airtankers are capable of being the initial weapon against fires in remote or difficult terrain. They can get to the fire before the ground personnel are able to reach the fire. Airtankers also support the efforts of the ground personnel, and act in a coordinated support capacity.

Devastating Fires in the Wildlands Demand Aerial Firefighting

Of course, it is the wildland areas that are primarily increasingly susceptible to large fires. Of significant concern is the rapidly expanding interface zone between wildlands and developed areas, the so-called wildland-urban interface ("WUI"), and changing climate conditions are producing longer fire seasons and more catastrophic fires.

As the on-going fires throughout Southern California have dramatically demonstrated, the airtanker fleet is of critical importance in fighting fires in the WUI where a significant amount of the major fires are happening. 60% of new housing was built in the WUI between 1990-2000, and as many as 42 million homes are located in the WUI. (The wildland-urban interface "the area where structures and other human developments meet or intermingle with undeveloped wildland.") United States Department of Agriculture,

Forest Service, *Accomplishing and Applying National Fire Plan Research and Development From 2001-2005*, Section 4:15, page 35, and section 4:16, page 37 (May 2007).

Moreover, the bulk of expert opinion is that there is a strong correlation between the increase in large scale wildland fires in the Western states and the changing climate conditions. As published in *Global Warming Amplifies Western Forest Fire Seasons*, Global Business Council for Sustainable Development, www.wbcsd.org, July 6, 2006 states:

> Climate models show that warmer springs and summers will likely continue to intensify, further increasing large wildfires and making forest management techniques such as thinning and fire suppression ineffective, according to the report by scientists at the Scripps Institution of Oceanography and the University of Arizona, to be published later today in the journal Sciencexpress.
>
> "The projected regional warming and consequent increase in wildfire activity in the Western U.S. is likely to magnify the threats to human communities and ecosystems, and significantly increase the management challenges in restoring forests and reducing greenhouse gas emissions," the report states. The Forest Service, National Oceanic and Atmospheric Administration and California Energy Commission funded the research.
>
> The average number of wildfires increased by a factor of four in the mid-1980s, burning

> an area 6.5 times greater than in the 1970s, as the fire season expanded and fires became more frequent and burned longer than in previous years. Annual changes in wildfire frequency appears "to be strongly linked to annual spring and summer" temperatures with "many more wildfires burning in hotter years than in cooler years," the report states.

As the United States Fire Service describes the escalating situation in the *Healthy Forests, the National Fire Plan – Healthy Forests Initiative*, Overview, Page 4:

> In recent years, most of us have seen televised pictures of wildland fires, evacuated communities, burned homes, and blackened forests, or witnessed these fires first hand. In 2002, Arizona, Colorado, Oregon and New Mexico, each had their largest timber fire in a century. The most devastating series of wildland fires in state history swept Southern California during October 2003. These fires killed 24 people, destroyed more than 3,700 homes, and burned 750,000 acres. Alaska set a record for acres burned in 2004. And, while fire has always helped shape our landscape, today's fires are not those of the past; they are often hotter, more destructive, and more dangerous to fight.
>
> We know in part the reason for the difference. Compared with earlier times, many of today's forests often have unprecedented levels of flammable materials including among other materials: underbrush, needles, and leaves.

> In the interior West for example, Ponderosa pine forests range from Arizona and New Mexico northward into Idaho. A century ago such a forest may have had some 25 mature trees per acre and be easily traversed on horseback or by a horse-drawn wagon. Today that same forest may have more than 1,000 trees on the same acre creating conditions that are much too thick for the passage of a hiker. These tightly packed trees are smaller, weaker, more disease prone, and more susceptible to insect attack than their ancestors. Such forests form huge reservoirs of fuel awaiting ignition, and pose a particularly significant threat when drought is also a factor.

Fires in the WUI create their own problems for the aerial firefighters. They are often in areas of hilly terrain, with wires, trees, and the heat of the fires themselves generate their own idiosyncratic winds. These areas present especially challenging environments for the aerial firefighters, especially when their concentration is on the pinpoint delivery of 1200 gallons of fire retardant while flying at 120-140 knots. Flying a fire suppression mission can be extremely hazardous. Pilots fly heavily loaded aircraft, through thick smoke and shifting winds, over rugged terrain with tall trees and power lines. They often must make tight turns to hit a fire drop zone in a mountain ravine where the fire retardant is dropped from an altitude of only 150 feet.

The demands of modern aerial firefighting are intensive and call for a highly trained and disciplined force. Fortunately the mortality rate has dropped, from about 20 per 100,000 flight hours to about four per 100,000 flight hours: about the same as a military combat squadron. The rate reduction is due to a combination of better pilot training, sturdier aircraft, and refined flight policies. However, it is critically important to maintain the firefighting force, to build on the training and experience that has developed, and to bring in and develop fresh recruits. The BJA exclusion hinders these demands and national policy.

Besides natural causes, there is also the additional concern of arson. This too has raised its head in the recent Southern California fires. The F.B.I. has long been concerned that domestic terrorists use arson in the wildlands as a terrorist weapon. (Testimony of James F. Jarboe, Domestic Terrorism Section Chief, Counterterrorism Division, Federal Bureau of Investigation, before the House Resources Committee, Subcommittee on Forests and Forest Health hearing on "Eco-terrorism and Lawlessness in the National Forests", February 12, 2002.)

The BJA Exclusionary Rule Is Contrary to the Intent of the PSOBA

The PSOBA is a recognition of the extraordinary risks public safety officers face. In the course of adopting the statute, Congress specifically expressed

Davis v. United States, 50 Fed.Cl. 192, 207 (Ct. Cl. 2001):

> "The motivation for this legislation is obvious: The physical risks to public safety officers are great; the financial and fringe benefits are not usually generous; and the officers are generally young with growing families and heavy financial commitments. The economic and emotional burden placed on the survivors of a deceased public safety officer is often very heavy.
>
> The dedicated public safety officer is concerned about the security of his family, and to provide the assurance of a Federal death benefit to his survivors is a very minor recognition of the value our government places on the work of this dedicated group of public servants.
>
> *S. Rep. No. 94-816,* at 3-4, reprinted in *1976 U.S.C.C.A.N.* at 2505. See also *Demutiis,* 48 Fed.Cl. at 85-86." *Davis v. United States,* 50 Fed.Cl. 192, 208 (Ct. Cl. 2001)

As the BJA announces in its website on the PSOBA:

> Enacted in 1976, the Public Safety Officers' Benefits (PSOB) Act (codified at 42 U.S.C. 3796, et seq.):
>
> - Assists in the recruitment and retention of qualified public safety officers.
> - Establishes the value that communities place on contributions from those

> who are willing to serve their communities during potentially dangerous circumstances.
>
> Offers peace of mind to men and women who are seeking careers in public safety.

However, BJA's exclusion of contract pilots directly countermands this purpose.

1. BJA's Exclusionary Policy Hinders Recruitment At A Critical Time

Recruitment is an acknowledged problem in firefighting generally. It is of particular concern for staffing the airtanker fleet where the average personnel age is already far higher than ground firefighting units. For instance, among the 53 pilots under contract for the CDF in 2007, 74% were over 50 years old, with 35% over 60 (6% were 20-29; 10% 30-39; 10% 40-49; 39% 50-59). The profile of the pilots working under the national contract is similar. While there is a benefit gained from experienced pilots, there is a need to replenish the supply of pilots. This is especially important at this time, when the number of large scale wildland fires is increasing, and there is increasing fire activity in the ever-growing WUI.

The firefighting careers of these experienced pilots extend beyond the individual periods of the agency contracts. The pilots fly for the same public firefighting agencies regardless of what entity is awarded the services contract from one period to

another. There are not competing groups of pilots available for contract. (For instance, most of the pilots over 50 years old have been with the CDF for over 20 years, although the contractor's name has changed about four times in that time.) The same pilots work for whatever the name of the entity that may have the CDF contract or the national contract for that particular period.

Exclusion from the PSOBA benefits hinders recruitment efforts. Significantly, *most firefighting pilots cannot obtain life insurance due to the inherent dangers of the work.* Although California has enacted legislation that compels the contractor to provide life insurance, there is no equivalent legislation for the pilots under the national contract. In any case, the PSOBA benefit was not an alternative to life insurance, but a one time benefit in addition to any life insurance, seen as a form of recognition and to enhance recruiting. These considerations are of special significance to aerial firefighters.

2. BJA's Exclusionary Policy Denies Respect and Recognition

A central purpose of the PSOBA benefits was "to provide the assurance of a Federal death benefit to . . . survivors" as "a very minor recognition of the value our government places on the work of this dedicated group of public servants." *S. Rep. No. 94-816*, at 3-4, reprinted in *1976 U.S.C.C.A.N.* at 2505;

Davis v. United States, 50 Fed.Cl. 192, 208 (Ct. Cl. 2001).

The BJA's exclusionary policy denies the families of the deceased pilots these benefits. It robs them of the peace of mind that Congress intended. Moreover, it is only the BJA and its exclusionary policy that does not recognize that airtanker pilots are serving a public agency in an official capacity. For instance, the fallen pilots are recognized by the United States Congress. The families of the fallen firefighter pilots, such as Mr. Lars Stratte and Mr. Larry Groff who were both killed in 2001 and had their claims rejected by the BJA, received from the United States Congress a "Certificate of Special Congressional Recognition" in memory of the fallen firefighter stating "I join with the Community in recognizing Your Unselfish Public service, and for Paying the Ultimate Price in Defending the People of this Great Nation." The fallen firefighters are memorialized at both the National Fallen Firefighters Monument and the California Firefighters Memorial.

For the pilots killed while flying under the CDF contract, the Governor of California and the CDF have recognized them as being members of the CDF. The CDF uniformly refers to them as being part of its forces.

The BJA policy is to not only deny the claims, but to discourage the claims. It is routine for the family of a fallen pilot to be told that contract pilots are not covered in response to an enquiry for PSOBA benefits. The

BJA also sends the family a copy of the *Holstine* decision in response to a request for PSOBA benefits and claim form. This clearly underscores that the exclusion is a blanket policy employed by the BJA, and that, even when it was bound to by its own regulations, it did not.

B. THE PILOTS ARE PUBLIC SAFETY OFFICERS SERVING PUBLIC AGENCIES IN AN OFFICIAL CAPACITY

The PSOBA provides:

> In any case in which the Bureau of Justice Assistance (hereinafter in this subchapter referred to as the "Bureau") determines, under regulations issued pursuant to this subchapter, that a public safety officer has died as the direct and proximate result of a personal injury sustained in the line of duty, the Bureau shall pay a benefit of $250,000. [42 U.S.C. § 3796(a)]

A public safety officer is defined by PSOBA, in relevant part, to be "an individual serving a public agency in an official capacity, with or without compensation, as a law enforcement officer, as a firefighter, as a chaplain, or as a member of a rescue squad or ambulance crew . . . " 42 U.S.C. § 3796b(9)(A) (formerly codified at 42 U.S.C. § 3796b(8)(A)). The operative definition of "firefighter" in the *Groff* case "includes an individual serving as an officially recognized or designated member of a legally organized volunteer fire department". 42 U.S.C. § 3796b(4). The

BJA acknowledged Mr. Groff as qualifying as a "firefighter."

The pilots working for the public agencies under contract through the third party providers serve these agencies in an official capacity. The differences between a CDF helicopter pilot and an airtanker pilot is the piece of equipment and where the paycheck comes from. Both fly under CDF rules and are directed by CDF personnel. For instance, a CDF contract air tanker pilot completes the same pilot application form as a CDF helicopter pilot. The Interagency Card is also the same. This Interagency Card gives the holder the right to fly a plane, or helicopter as the case may be, for the CDF or USFS, and also allows the pilot to operate as a firefighter and take control of fire scenes. It also gives the pilot the responsibility of initial attack on a fire, and is entrusted with the public safety to act as initial attack. The Interagency Card holder can close down airspace and state and federal highways if they see these actions as necessary. The Interagency Card is issued by the agency, CDF or USFS, not the contractor. The Interagency Card entitles the pilot to operate on fires on private and public lands, whether federal or state, and under the interagency agreements. The holder operates and is a State fire officer, and acts as a pilot-in-command of a fire scene. In the recent Presidential visit to Southern California during the fires, the Interagency Card holder firefighters were the only aircraft permitted to fly in the temporary no fly area created for the President.

The pilots perform an official function, flying a public aircraft as part of the public firefighting force to put out a fire threatening state owned property, people's lives and private homes. In the case of CDF pilots, they are stationed at CDF air attack bases, fly CDF planes as ordered by CDF controllers. They drop fire retardant under CDF direction while fighting a fire as part of the overall CDF incident response effort where their actions are integrated with all other CDF units on the ground and in the air. They have the authority as a State firefighter pilot under the Federal Aviation Regulations to close airspace to civil aircraft, to get priority handling from the FAA on airspace use, and to give orders as necessary to suppress wildland fires. Except for the way they are provided their paycheck, there is no difference between them and a direct CDF employee.

There is no restriction in the PSOBA that restricts the benefits to direct employees only. Even in the unpublished *Holstine* decision issued by the BJA when it initially denied a contract pilot benefits, the BJA employed a working definition that did not restrict the benefits to employees only. As with the language of the statute, "serving . . . in an official capacity", the agency definition included in *Holstine* is broader than "employee", focusing on function and a relationship "similar" to an officer, employee, or volunteer. In *Holstine*, the BJA included a definition of the meaning of "serving . . . in an official capacity."

> In order to be serving a public agency in an official capacity one must be an officer, employee, volunteer, or similar relationship of performing services as a part of a public agency. To have such a relationship with a public agency, an individual must be officially recognized or designated as functionally within or a part of the public agency.

In *Holstine*, the BJA ignored its own working definition and denied a PSOBA benefits claim relating to a privately employed pilot who was killed while performing state aerial firefighting duties. The BJA relied upon two factors: (1) the contract between CDF and the third party contractor, which included the *pro forma* provision that the contractor, its agent and employees "shall act in an independent capacity and not as officers or agents of the State of California", and (2) one colloquy in the House as "proof" of Congressional intent to exclude contractors from PSOBA coverage, to wit:

> Rep. Myers: "Could the gentleman tell me, is there any way in which this bill would apply to privately employed safety or security officers?"
>
> Rep. Eilberg: "No, it would not."
>
> Rep. Myers: "What if they were called by a local arm of the government or the local police organization to assist in any way?"

> Rep. Eilberg: "It is my opinion that they would not be included."

122 Cong. Rec. 12002, 12009 (1976).

As set forth in detail in this brief, this isolated reference to an *ad hoc* call for assistance to a private security guard does not bear any resemblance to the integrated role of the aerial firefighters in modern firefighting.

In the face of its stated definition, the BJA's practice of holding that an official capacity *per se* cannot exist when a contractor or privately-employed individual provides service for the public agency is erroneous and unreasonable. Someone serving a public agency in an official capacity who is not an employee but in a "similar relationship", who is functionally a part of the public agency is supposed to be covered according to the BJA's interpretation. The BJA's inquiry begins and ends with the fact that he was employed through a contractor and they almost exclusively focus on the face of the contract.

C. AS THE FEDERAL CLAIMS COURT FOUND IN *GROFF*, THE PILOTS HAVE A SIMILAR RELATIONSHIP TO AN EMPLOYMENT OR VOLUNTEER RELATIONSHIP AND ARE OFFICIALLY RECOGNIZED AS FUNCTIONALLY PART OF THE AGENCY

The BJA routinely ignores the facts showing the nature of the work and the day-to-day control exerted by the agencies, such as the CDF. Instead, the BJA

myopically focuses on the employer-employee relationship between the contractor and the pilot and the contract language governing the relationship between the agency and the contractor. In so doing, this elevates form over substance and ignores the concept of "service." *United States v. R.F. Ball Constr. Co.*, 355 U.S. 587, 593, 78 S.Ct. 442, 2 L. Ed. 2d 510 (1958) ("Substance, not form or labels, controls the nature and effect of legal instruments."), reh'g denied, 356 U.S. 934, 78 S.Ct. 770, 2 L. Ed. 2d 763 (1958). Unfortunately, this is a common occurrence with the BJA and PSOBA benefits.

1. Mr. Groff was in a Similar Relationship to An Employee of a Public Agency at the Time of His Death

As the Federal Claims court correctly noted in the *Groff* case, the airtanker pilots like Mr. Groff are "a clear example of a non-employee who nonetheless is similarly providing services as part of a public agency, much like a public employee." As the Federal Claims court pointed out in the *Groff* case, the BJA "apparently chose to disregard the CDF's official recognition that Mr. Groff was a functional part of the CDF." This is what the BJA routinely does in the case of the contract pilots. The BJA's refusal to accept the CDF's clear official recognition that Mr. Groff was functionally within the CDF has no support in the representations of the CDF and "is unwarranted." (*Groff* Appendix ["App."] p. 70a.) Once again, despite the fact the BJA was required to give substantial

weight to the CDF's findings, it failed to do so. Based on the above, the CDF clearly recognized Mr. Groff as functionally within the CDF at the time of his death, and, accordingly, the BJA's own "official recognition" test is satisfied. (App. p. 70a.)

First, the CDF procedures handbook for pilots fighting fires for the CDF demonstrates that Mr. Groff was "fully integrated into the firefighting services of the CDF." (App. p. 57a.) The Federal Claims court analyzed the administrative record and found that:

> During operations, Mr. Groff was supervised by a CDF air tactical supervisor who would "ordinarily fly in an orbit above the level of the airtankers and . . . describe targets to the airtanker and helicopter pilots." The CDF dispatched the planes flown by pilots, including Mr. Groff. The CDF specified what uniforms pilots would wear. Mr. Groff and others were required to participate in mission debriefings and were evaluated by CDF personnel. Contractor pilots had CDF credit cards for refueling.

(App. p. 57a.)

Second, following Mr. Groff's death, a CDF official wrote two letters describing the nature of Mr. Groff's services and his relationship to the CDF. The letters, written to the BJA from the CDF Deputy Chief of Aircraft Maintenance and Engineering, set forth various aspects of Mr. Groff's services. Specifically, the CDF official noted that, among other things,

Mr. Groff was a carded airtanker pilot authorized to operate State fire fighting aircraft, that the State of California and the United States benefited from Mr. Groff's operations, that Mr. Groff was operating the airtanker for the State of California on State fires, that Mr. Groff operated the aircraft owned by the State and at the direction of CDF dispatchers and airborne air attack officers, that he slept in State bases, ate State furnished meals, and was required to wear a State supplied flight suit and helmet. (App. p. 59a-61a.)

Importantly, the CDF official noted that the CDF sets pilot standards, approves hiring and training of each pilot, and issues airtanker cards to the pilots "for State duty." (App. p. 61a.) The CDF noted that the "sole function of the contractor (SJH, in this case) was/is to provide a means of paying the pilots. . . ." (App. p. 61a.) These are "recitations of fact" by a governmental agency that should have been considered by the BJA. Based on these facts, the Federal Claims court correctly found that Mr. Groff was functioning as a part of the CDF when he was performing firefighting services, "much like a CDF employee." (App. p. 61a.) The BJA, however, failed to give substantial weight to these findings, as it was required to do. *Demutiis v. United States*, 291 F.3d 1373, 1379-80 (Fed. Cir. 2002).

The Federal Claims court correctly noted that the BJA failed to give substantial weight to the CDF's findings. This is yet another example of the fact the BJA erred finding that Petitioners were ineligible for

benefits and that the BJA's failure to accord weight to these facts was unreasonable.

2. Mr. Groff was Officially Recognized and Designated as Functionally Within the CDF

The record is replete with examples of official recognition by the CDF of Mr. Groff's services showing he was officially recognized or designated as functionally within the CDF or a part of the CDF. As the Federal Claims court noted, the CDF referred to Mr. Groff as "one of our pilots." (App. p. 58a.) Mr. Groff was identified as a "State firefighter pilot." (App. p. 60a.) Moreover, the CDF directly addressed the issue of Mr. Groff's official recognition and his role within the CDF:

> Captain Groff was, in our opinion, serving as an officially recognized and designated member of the California Department of Forestry and Fire Protection. . . . The following facts support our claim. . . .
>
> 1. Mr. Groff was an interagency "carded" Airtanker Pilot. This designation authorized Mr. Groff to operate a State fire fighting airtanker as Pilot-in-Command. Mr. Groff had the authority, duty and obligation to respond to wildland fires and to take immediate and independent action to suppress and combat wildfires.

> 8. [California] Governor Gray Davis issues a Statewide proclamation designating Mr. Groff as a firefighter and a hero.
>
> 9. Mr. Groff's name has been added to the State firefighter's memorial located in the State Capitol.
>
> 10. Mr. Groff's name has been added to the national firefighter's memorial in Maryland.

(App. p. 65a-66a.)

As the Federal Claims court pointed out, the BJA "apparently chose to disregard the CDF's official recognition that Mr. Groff was a functional part of the CDF." (App. p. 66a.) The BJA's refusal to accept the CDF's clear official recognition that Mr. Groff was functionally within the CDF has no support in the representations of the CDF and "is unwarranted." (App. p. 70a.) Once again, despite the fact the BJA was required to give substantial weight to the CDF's findings under *Demutiis*, it failed to do so. Based on the above, the CDF clearly recognized Mr. Groff as functionally within the CDF at the time of his death, and, accordingly, the BJA's own "official recognition" test is satisfied. (App. p. 70a.)

CONCLUSION

For the reasons set forth above and in Petitioner's brief, this Court should grant the Petition for a Writ of Certiorari requested in this case.

Dated: October 31, 2007.

Respectfully submitted,

ROBERT E. THOMPSON